

CA20N

Z1

-64A02

ROYAL COMMISSION



ONTARIO

Inquiry into Civil Rights

REPORT No. 2

VOLUME 4

(c.1)

Page

Ontario Royal commission, inquiry into civil rights,

Report no. 2 pt 4. 1969.

1968

v.4

C120N
Z1
64902



ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS

PART IV

REPORT NUMBER TWO

1969

COMMISSIONER

HONOURABLE JAMES CHALMERS McRUER, S.M., LL.D.

ASSISTANTS TO THE COMMISSIONER

DAVID W. MUNDELL, Q.C., B.C.L. (OXON.)

ROBERT S. MACKAY, Q.C., LL.M. (COLUMBIA)

CONSULTANTS TO THE COMMISSIONER

J. A. CORRY, C.C., B.C.L., (OXON), LL.M., LL.D., F.R.S.C.

JOHN D. ARNUP, Q.C., LL.D.

COUNSEL TO THE COMMISSIONER

JOHN W. MORDEN, LL.B.

STEPHEN BORINS, LL.B.

CHIEF RESEARCH ASSISTANT

CAROL M. CREIGHTON, LL.B.



**ROYAL COMMISSION
INQUIRY INTO CIVIL RIGHTS**

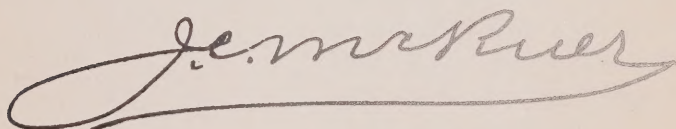
VOLUME 4

Printed and Published by
FRANK FOGG
Queen's Printer

To His Honour,
The Lieutenant-Governor of the
Province of Ontario.

May it please Your Honour:

Having been appointed by Royal Commission to perform the duties set out in the Commission and the Order in Council authorizing it, I submitted the first Report of the Commission on February 7, 1968. I now have the honour to submit Report Number 2.

A handwritten signature in dark ink, reading "J. E. McRuer". The signature is fluid and cursive, with a long, sweeping underline that extends across the width of the text.

Commissioner.

September 15, 1969



Digitized by the Internet Archive
in 2023 with funding from
University of Toronto

<https://archive.org/details/39022103010038>



Elizabeth II

[Seal]

PROVINCE OF ONTARIO

ELIZABETH THE SECOND, by the Grace of God of the
United Kingdom, Canada,
and Her other Realms and
Territories Queen Head of
the Commonwealth Defender
of the Faith.

TO THE HONOURABLE JAMES CHAMBERLAIN
McRUER, of Our City of
Toronto, in Our Province
of Ontario, Chief Justice of
Our High Court of Ontario,
and One of Our Counsel
learned in the Law,

CREATING

WHEREAS in and by Chapter 323 of the Revised Statutes of Ontario, 1960, entitled "The Public Inquiries Act", it is enacted that whenever Our Lieutenant Governor in Council deems it expedient to cause inquiry to be made concerning any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or of the administration of justice therein and such inquiry is not regulated by any special law, he may, by Commission appoint one or more persons to conduct such inquiry and may confer the power of summoning any person and requiring him to give evidence on oath and to produce such documents and things as the commissioner or commissioners deem requisite for the full investigation of the matters into which he or they are appointed to examine;

AND WHEREAS Our Lieutenant Governor in Council of Our Province of Ontario deems it expedient to cause inquiry to be made concerning the matters hereinafter mentioned:

NOW KNOW YE that WE, having and reposing full trust and confidence in you the said James Chalmers McRuer DO HEREBY APPOINT you to be Our Commissioner, under the designation "Inquiry into Civil Rights",

1. To examine, study and inquire into the laws of Ontario including the statutes and regulations passed thereunder affecting the personal freedoms, rights and liberties of Canadian citizens and others resident in Ontario for the purpose of determining how far there may be unjustified encroachment on those freedoms, rights and liberties by the Legislature, the Government, its officers and servants, divisions of Provincial Public Service, boards, commissions, committees, other emanations of government or bodies exercising authority under or administering the laws in Ontario.
2. After due study and consideration to recommend such changes in the laws, procedures and processes as in the opinion of the commission are necessary and desirable to safeguard the fundamental and basic rights, liberties and freedoms of the individual from infringement by the State or any other body.

AND WE DO HEREBY CONFER on you, Our said Commissioner, the power to summon any person and require him to give evidence on oath and to produce such documents and things as you Our said Commissioner deem requisite for the full investigation of the matters into which you are appointed to examine;

AND WE DO HEREBY FURTHER ORDER that all our departments, boards, agencies and committees shall assist you, Our said Commissioner, to the fullest extent, and that in order to carry out your duties and functions, you shall have the authority to engage such counsel, research and other staff and technical advisers as you deem proper;

TO HAVE, HOLD AND ENJOY the said Office and authority of Commissioner for and during the pleasure of Our Lieutenant Governor in Council for Our Province of Ontario.

IN TESTIMONY WHEREOF We have caused these Our Letters to be made Patent, and the Great Seal of Our Province of Ontario to be hereunto affixed.

WITNESS: THE HONOURABLE WILLIAM EARL ROWE, A Member of Our Privy Council for Canada, Doctor of Laws, LIEUTENANT GOVERNOR OF OUR PROVINCE OF ONTARIO

at our City of Toronto in Our said Province, this twenty-first day of May in the year of Our Lord one thousand nine hundred and sixty-four and in the thirteenth year of Our Reign.

BY COMMAND

(Signed) JOHN YAREMKO,
PROVINCIAL SECRETARY AND
MINISTER OF CITIZENSHIP

ORDER-IN-COUNCIL

Copy of an Order-in-Council approved by His Honour the Lieutenant Governor, dated the 21st day of May, A.D. 1964.

The Committee of Council have had under consideration the report of the Honourable the Prime Minister, dated May 20, 1964, wherein he states that,

Recognizing that the evolution, development and growth of the traditional parliamentary powers of the Legislature, and of the administrative authority and processes of Government, give rise to continuing and readjustments in the internal structure of society and the need to preserve and promote basic principles relating to the civil liberties, human rights, fundamental freedoms and privileges of the individual citizen in citizenship.

The Honourable the Prime Minister recommends that pursuant to the provisions of The Public Inquiries Act, R.S.O. 1960, Chapter 323, and effective May 1, 1964, a commission be issued appointing,

The Honourable James Chalmers McRae,
Chief Justice of the High Court for Ontario,
a commissioner, under the designation "Inquiry into Civil Rights",

1. To examine, study and inquire into the laws of Ontario including the statutes and regulations passed thereunder affecting the personal freedoms, rights and liberties of Canadian citizens and others resident in Ontario for the purpose of determining how far there may be unjustified encroachment on those freedoms, rights and liberties by the Legislature, the Government, its officers and servants, divisions of Provincial Public Service, boards, commissions, committees, other emanations of government or bodies exercising authority under or administering the laws in Ontario.
2. After due study and consideration to recommend such changes in the laws, procedures and processes as in the opinion of the commission are necessary and desirable to safeguard the fundamental and basic rights, liberties and freedoms of the individual from infringement by the State or any other body.

The Honourable the Prime Minister further recommends that pursuant to the said Act the Commissioner shall have the power of summoning any person and requiring him to give evidence on oath and to produce such documents and things as the Commissioner deems requisite for the full investigation of the matters into which he is appointed to examine.

And the Honourable the Prime Minister further recommends that all Government departments, boards, commissions, agencies and committees shall assist the Commissioner to the fullest extent in order that he may carry out his duties and functions and that he shall have authority to engage such counsel, research and other staff and technical advisers as he deems proper.

The Committee of Council concur in the recommendations of the Honourable the Prime Minister and advise that the same be acted on.

Certified,

(Signed) J. J. YOUNG

Clerk, Executive Council.

ACKNOWLEDGMENTS

In addition to those whose generous services and co-operation were acknowledged in our first Report, your Commissioner wishes to acknowledge his indebtedness to Professor Louis Baudouin, docteur en droit ès science-juridique, docteur en droit ès science-politique, M.S.R.C., Professor of Law at the University of Montreal, and to Professor W. R. Lederman, LL.B., B.C.L. (Oxon), LL.D., formerly Dean of the Faculty of Law of Queen's University, for the valuable contribution they have made to the work of the Commission through research done and material supplied, the former with respect to the Administrative Courts of France, and the latter concerning a Bill of Rights.

We would feel remiss if we did not again express our appreciation of the devoted services rendered in the preparation of this Report by Mrs. Carol M. Creighton, LL.B., our chief research assistant.

We likewise express our appreciation of the services of Miss Katherine Finnegan, who succeeded Mrs. Tate as Secretary of the Commission, and Mrs. Pauline Wheeler, who has had so much to do with the preparation of the manuscript.

Table of Contents

VOLUME 4

PART IV

PAGE

GENERAL SAFEGUARDS AGAINST UNJUSTIFIED ENCROACHMENTS OR INFRINGEMENTS ON THE RIGHTS OF THE INDIVIDUAL	1333
Introduction	1335

SECTION 1

SUPERVISION OVER THE EXERCISE OF ADMINISTRATIVE AND JUDICIAL POWERS ..	1337
Introduction	1338

SUBSECTION 1

AN OMBUDSMAN OR PARLIAMENTARY COMMISSIONER	1339
Introduction	1340

CHAPTER 88

THE OFFICE OF OMBUDSMAN IN SWEDEN ...	1341
The Functions of the Ombudsman	1343
The Supervision of the Courts	1344
Relations with the Press	1345

CHAPTER 89

THE OFFICE OF OMBUDSMAN IN DENMARK	1346
The Legal Basis of the Office	1347
The Functions of the Ombudsman	1347
Scope of the Ombudsman's Authority	1348
Central Government	1348
Local Government	1348

	PAGE
Complaints	1349
Procedure	1349
The Ombudsman's Powers	1350
CHAPTER 90	
THE OFFICE OF PARLIAMENTARY COMMIS- SIONER IN NEW ZEALAND	1353
The Functions of the Ombudsman	1354
Complaints	1355
Procedure in Dealing with Complaints	1355
Action	1356
Nature of Jurisdiction Exercised	1357
CHAPTER 91	
THE OFFICE OF PARLIAMENTARY COMMIS- SIONER FOR ADMINISTRATION IN GREAT BRITAIN	1374
Appointment	1375
Scope of Authority	1375
Procedure	1379
Powers of the Commissioner	1380
Secrecy	1380
Complaints Considered	1381
CHAPTER 92	
CONCLUSIONS	1383
SUBSECTION 2	
COMPLAINTS CONCERNING THE ADMINIS- TRATION OF JUSTICE	1391
Introduction	1392
CHAPTER 93	
COMPLAINTS CONCERNING THE OPERA- TION OF THE COURTS	1393
CHAPTER 94	
COSTS INCURRED THROUGH JUDICIAL ERROR	1404
Summary of Recommendations	1405

SECTION 2

	PAGE
FRENCH ADMINISTRATIVE COURTS	1409
Introduction	1410

CHAPTER 95

HISTORY OF FRENCH ADMINISTRATIVE COURTS	1415
--	------

CHAPTER 96

COMPOSITION AND FUNCTIONS OF THE CONSEIL D'ETAT	1418
The Conseil d'Etat as an Administrative Court	1420

CHAPTER 97

THE JUDICIAL POWERS OF THE ADMINISTRATIVE COURTS	1424
Contentieux des Droits ou de Pleine Jurisdiction	1424
Contentieux d'Annulation (Remedy for Annulment)	1426
Le Recours Pour Excès de Pouvoir	1426
The Development of the Action	1427
The Grounds for the Action	1429
Incompétence (Incompetency)	1430
Incompétence Ratione Materiae	1431
Incompétence Ratione Loci	1433
Incompétence Ratione Temporis	1433
Vice de Forme (Defect in form)	1434
What is a Substantial Formality?	1435
Violation de la Loi (Breach of Law)	1436
What May be a Violation of the Law?	1437
Le Détournement de Pouvoir (The wrongful exercise of power)	1438
The Administration May Not Have Acted for the Protection of the Public Interest	1439
The Administration May Have Used Its Power in the Interest of a Third Person or of a Certain Class of Persons	1440
The Administrative Act May Have Been Done for Improper Political Purposes	1440

	PAGE
The Administration May Have Acted in Another Public Interest than the One in which it was Empowered to Act	1440
Wrong Purposes	1441
Violation des Principes Généraux du Droit	1441
 CHAPTER 98 	
GENERAL PRINCIPLES APPLIED BY THE COURT IN THE EXERCISE OF ITS JURIS- DICTION	1443
No Retroactive Effect of Acts of Administration	1443
Violation of Fundamental Liberties	1443
Violation of "Res Judicata" (Refusal to give effect to a decision)	1444
Supervision and Control of the Motifs (reasons) for Administrative Acts	1445
Motifs de Droit (Reasons of Law)	1445
Motifs de Fait (Reasons of fact)	1447
Exactitude de la Matérialité des Faits (Material correctness of the facts)	1448
Appreciation of the Juridical "Qualification" as Applied by the Administrative Authority	1448
Policy Decisions	1449
Supervision of Delegation of Authority	1450
 CHAPTER 99 	
PROCEDURE	1452
La Décision Préalable (Preliminary Decision)	1452
"Capacité" (Interest to institute the action)	1454
The Material Required	1454
Interlocutory Measures	1455
Interim Suspension of the Decision	1455
Emergency Orders	1455
Evidence	1456
The Rapporteur	1456
The Commissaire du Gouvernement	1457
The Judgment	1457
Counsel	1459
Special Characteristic Features of Procedure before the Conseil d'Etat	1460

CHAPTER 100

	PAGE
CONCLUSIONS AND RECOMMENDATIONS	1462
Control Over "Absolute Administrative Discretion"	1468
Production of the Documentary Material	1471
Legislative Changes Affecting Government Contracts	1471
Recommendations	1472

SECTION 3

A BILL OF RIGHTS FOR ONTARIO	1475
Introduction	1476

SUBSECTION 1

THE NATURE OF CONSTITUTIONS AND THE GOVERNMENTAL PROCESSES AND INSTI- TUTIONS THEY ESTABLISH	1479
Introduction	1480

CHAPTER 101

CHARACTERISTICS OF CONSTITUTIONAL LAW	1481
Constitutional Law in the Broad Sense	1482
Constitutional Law in the Limited Senses	1483
Austin's Theory of Sovereignty	1484
Dicey's Theory of Sovereignty	1486
The Sovereignty of the Ideas of the People	1486
Constitutional Division of Legislative Powers	1490

CHAPTER 102

THE LEGAL NATURE OF POWERS, RIGHTS, AND FREEDOMS	1493
---	------

SUBSECTION 2

CONTENT OF DECLARATIONS CONCERNING BASIC HUMAN RIGHTS AND FREEDOMS AND ALTERNATIVE MEANS OF GIVING THEM AUTHORITATIVE STATUS	1499
Introduction	1500

CHAPTER 103

	PAGE
CONTENT OF PROPOSITIONS ESTABLISHING HUMAN RIGHTS AND FREEDOMS	1501
The Particular and the General	1501
The Need for Both General and Particular Propo- sitions	1502
Meaning and Implementation of General Propo- sitions	1509
Abstract Declarations of Principles as Guides	1512
Sets or Groups of General and Abstract State- ments Overlap and Conflict with the Particular	1514
The Need to Provide for Proper Discriminations as well as Essential Equalities	1518
Children and Mentally Ill Persons	1519
Special Groups	1520
Corporate Bodies	1521
Prohibition of Discrimination	1525
Alternate Ways of Classifying Propositions Establish- ing Human Rights and Freedoms	1526

CHAPTER 104

POLITICAL AND LEGAL FORMS ESTABLISH- ING HUMAN RIGHTS AND FREEDOMS	1530
The Need for Authoritative Processes	1530
Who Has the Last Word?	1531
Summary	1534
Powers to Make and Apply Laws: The Total Process	1535
The Forms of Authoritative Status	1541
Fundamental Customary Law of the Constitution	1541
The Rules of Procedure of the House of Commons	1541
Conventions of the Constitution	1541
The Common Law	1542
Ordinary Statutes of Federal or Provincial Parlia- ments	1542
Superior Constitutional Law (Special Entrench- ment)	1543
Distribution of Legislative Powers	1543
Entrenchment of Basic Rights, Liberties and Freedoms	1543

	PAGE
Authoritative Interpretation	1544
Statutory Directive Principles as Aids to Interpretation	1547
Summary	1553

CHAPTER 105

TECHNIQUES OF PERSUASION AND ENFORCEMENT	1555
Conflict Between Private Persons and Other Private Persons or Groups	1556
Conflict Between Private Persons or Groups and Government	1560

CHAPTER 106

THE APPROPRIATE BLENDING OF PARLIAMENTARY AND JUDICIAL SUPREMACY IN THE CONSTITUTION: THE NEED FOR INTEGRATION AND COMPLETENESS	1565
The Judges as Policy Makers	1567
Rights Essential to Parliamentary Democracy	1570

CHAPTER 107

ENTRENCHMENT	1577
--------------------	------

CHAPTER 108

CONCLUSIONS	1595
A Provincial Bill of Rights	1598
Entrenchment by a Requirement for a Special Majority	1598
Entrenchment by a Requirement for a Referendum	1604
A Bill of Rights Without Entrenchment	1606
Summary of Conclusions and Recommendations	1607

APPENDIX "A" TO SECTION 3

SELF INCRIMINATION AMERICAN EXPERIENCE	1611
Introduction	1611

	PAGE
When the Protection Arises	1612
The Extent of the Protection	1616
What is Protected?	1620

APPENDIX "B" TO SECTION 3

NEW YORK STATE CONSTITUTION	1626
Amending Process	1626
Bill of Rights	1627
Comments	1634
Section 1: The Franchise	1634
Section 2: Trial by Jury	1634
Section 3: Religious Freedom	1636
Section 4: Habeas Corpus	1637
Section 5: Bail, Fines and Punishment	1637
Section 6: Indictment	1638
Right to Appear and Defend	1639
Double Jeopardy	1640
Self-Incrimination	1641
Due Process	1641
Section 7: Compensation for Taking Private Property	1641
Section 8: Freedom of Speech	1644
Section 9: Right to Assemble and Petition the Government, Etc.	1645
Divorce only by Due Judicial Pro- ceedings	1645
Lotteries	1645
Section 10: Land Tenure	1646
Section 11: Equal Protection of Laws, No Dis- crimination	1647
Section 12: Security Against Searches and Sei- zures	1647
Section 13: Purchase of Land from the Indians...	1647
Section 14: Common Law and Early Acts of the Legislature	1647
Section 15: Grants of Land Made by the King of Great Britain	1648
Royal and State Charters	1649

	PAGE
Section 16: Damages for Injuries Causing Death	1649
Section 17: Rights of Labour	1649
Section 18: Workmen's Compensation	1649

APPENDIX "C" TO SECTION 3

THE SASKATCHEWAN BILL OF RIGHTS	1650
CONSOLIDATED SUMMARY OF RECOMMENDATIONS	1653
BIBLIOGRAPHY	1663
TABLE OF CASES	1669
TABLE OF STATUTES	1682
INDEX	1709

PART IV
GENERAL SAFEGUARDS AGAINST
UNJUSTIFIED ENCROACHMENTS OR
INFRINGEMENTS ON THE RIGHTS
OF THE INDIVIDUAL

INTRODUCTION

In the Report submitted on February 7, 1968 we stated that the Report of this Commission would be divided into five parts under the following heads:

- PART I — The Exercise and Control of Statutory Powers in the Administrative Process;
- PART II — The Administration of Civil and Criminal Justice in the Province;
- PART III — Safeguards Against the Unjustified Exercise of Certain Special Powers;
- PART IV — General Safeguards Against Unjustified Encroachments or Infringements;
- PART V — The Application of General Principles to Specific Statutory Tribunals.

Parts I, II and III were contained in that Report. We proposed that the following subjects would be included in Parts IV and V: a Legislative Commissioner or Ombudsman for Ontario; the Continental system of providing safeguards against unjustified encroachment on civil rights through administrative courts such as the Conseil d'Etat of France; compensation for damage suffered by specific individuals through the exercise of statutory powers; and a survey of the Statutes of Ontario that confer powers of encroachment or infringement on civil rights on specific boards and commissions established under the Statutes of Ontario.

The Ontario Law Reform Commission has entered upon a study which will include the law with respect to compensation for damage suffered by specific individuals through the exercise of statutory powers. Since this study should thoroughly cover all aspects of the subject it will not be necessary for us to deal with this matter.

In order that our recommendations concerning a Parliamentary Commissioner or Ombudsman, the French Administrative Courts and a Bill of Rights for the Province may be made available as soon as possible, we have decided not to delay the submission of Part IV of the Report until the analysis and discussion of the powers and procedure of the various boards, commissions and tribunals acting under the authority of the Provincial Legislature has been completed.

We are accordingly submitting Part IV herewith and the subjects we have just referred to will be dealt with in Part V which will complete our submissions.

Section 1

**SUPERVISION OVER THE EXERCISE
OF ADMINISTRATIVE AND JUDICIAL POWERS**

INTRODUCTION

In Report Number 1 we discussed in detail the revision of the laws of Ontario to give effective legal rights as safeguards against unjustified encroachment by different instruments of government on the civil rights of the individual. As part of that discussion the emphasis was on the development of good procedure in the decision-making process at all levels of government and proper provision for means of correcting errors through judicial review or appeal.

In certain Continental countries, particularly the Scandinavian countries, another approach has been taken to the solution of the problems arising out of maladministration on the part of government servants or judicial officers. An office has been established, the holder of which can be loosely termed "the representative of the people" (an Ombudsman). With this officer the individual may lodge his complaint and an investigation follows. As we shall see the concept of this office arose in Sweden out of a system of government quite different from that which we have inherited in this Province. However, the concept has been adopted and adapted to forms of government different from that of Sweden and including government through a parliamentary system similar to ours. We, therefore, consider in this Section the suggestion that the office of Ombudsman should be created in Ontario and what duties the holder of the office should perform if such an office is created.

In no country having a parliamentary system similar to ours has the Ombudsman been given any supervisory power over the administration of justice. It is therefore necessary for us to consider here what means, if any, should be provided for the consideration of complaints concerning the administration of justice which cannot be adequately dealt with through the ordinary processes of appeal.

Subsection 1

**AN OMBUDSMAN OR
PARLIAMENTARY COMMISSIONER**

INTRODUCTION

During the public hearings of this Commission representations were made to us urging that statutory provision should be made for an official who would perform duties similar to those of the Ombudsman in Sweden and Denmark, or the Parliamentary Commissioner in Great Britain and New Zealand.

The office of Ombudsman had its origin in Sweden in a political system quite different from our form of democratic government which recognizes the responsibility that ministers of the Crown owe to the legislative body and the power of the legislative body to call ministers of the Crown to account for their own actions and those of their departmental officials.

We have selected the experience in Sweden, Denmark, New Zealand and England as examples of countries where an official has been appointed to perform duties that may be broadly characterized as those of an Ombudsman.

In addition to these countries the office of Ombudsman or Parliamentary Commissioner has been created in other jurisdictions to perform duties similar to those performed by the Ombudsman or Parliamentary Commissioner in the countries we discuss. Other countries, provinces and states which have the office are: Finland, Norway, Alberta, New Brunswick, Quebec and Hawaii. In the Preface to the Second Edition of *The Ombudsman*, Professor D. C. Rowat sets out proposals for an Ombudsman that have been put forward but not adopted in other countries.¹

¹p. vi.

CHAPTER 88

The Office of Ombudsman in Sweden

UNDER the Swedish Constitution of 1809 an office of Justitieombudsman was created. The idea of the office ante-dates the Constitution by 100 years. In 1713 Charles XII appointed an official as an overseer of the conduct of his officials to protect the royal interests while he was absent on foreign campaigns. The duties of this official had to do mostly with the tax gatherers, judges and administrators who acted in the name of the King.¹ That office continues until this day under the title of "Chancellor of Justice". Its duties overlap to some extent with the present-day duties of the Ombudsman.

As royal power declined, and representative democracy developed, Parliament felt the need of an official with duties similar to those of the Justitieombudsman to scrutinize the actions of administrative officials on behalf of, and to report to, the legislative body. The fundamental reason for this office in Sweden has rested in its form of government. The civil servants who administer the law of the country are appointed in form by the King but he does not exercise political power. The decisions he purports to make are made by 17 councillors of state who are referred to as Cabinet Ministers but only two of whom, the Prime Minister and the Foreign Minister, officially bear ministerial title. The Ministers are chosen by

¹Gellhorn, *Ombudsmen and Others*, 194.

the Prime Minister and need not be members of Parliament. They do not administer departments. There are large areas of administration that are not under the supervision of either Ministers or Parliament. Each official engaged in the administration of the affairs of government is largely answerable only to "The Law" and his own conscience rather than to a higher official. Parliament may prescribe how laws are to be administered but the interpretation rests with the official. There is, however, control by way of appeal to the King in Council and the hope of promotion provides a measure of remote but real control.

In the judicial branch of government there is a similar scheme of independence. Judges of lower courts are not controlled by the decisions of higher courts. While judges may be influenced by the reasoning of other judges they are free to apply "The Law" as they see it in each case. Similarly each public prosecutor is not under direction of a department of government. He must do his duty according to "The Law". The supreme prosecutor may attempt to harmonize actions but has no power to direct.² There are provisions for appeals not only to administrative boards but to the King in Council and to the Supreme Administrative Court which exercises some of the powers of the King in Council.

For our purposes it is not necessary to discuss in any greater detail the processes of government in Sweden other than to say that the operations of Swedish government officials are much more public than those of other countries. By a law passed in 1926 the departmental files are open to the public except those concerning pending decisions and those of a confidential nature such as files containing criminal or personal records, or pertaining to the security of the state. The press has a right to examine and publish the contents of all files that are open to the public. Mr. Bexelius, the Swedish Ombudsman, told us that this practice was more important than the office of Ombudsman.

This is the political atmosphere in which the Ombudsman functions in Sweden.

²*Ibid.*, 199.

The official to occupy the office is chosen by 48 electors, 24 from each chamber of the Parliament, selected in proportion to the strength of the political parties in the chamber. The object is to place the holder of the office in a position of complete independence. The Constitution requires that the Ombudsman be a person of "known legal ability and outstanding integrity". The practice has been to appoint a judge.³

THE FUNCTIONS OF THE OMBUDSMAN

The Ombudsman does not have powers of review or power to reverse administrative decisions. He has power to inquire, discuss and maybe by persuasion to secure reversal or modification of a decision. He may, or may not, report to Parliament. But he has great powers of a punitive nature. He can prosecute for the crime of "criminal breach of duty". Before commencing such a prosecution he must give the alleged offender an opportunity to explain his conduct.

Traditionally, the Ombudsman has been required to conduct inspections of all government agencies and the courts. How thoroughly this is done is questionable. Nevertheless, it would appear that there are checks to ascertain whether there is undue delay in the trial of cases and prosecutors' records are examined and institutions (prisons in particular) are visited. Professor Gellhorn warns against idealizing this inspection procedure and points out that an experienced officer in a community some distance from Stockholm could recall no inspection in 35 years and inspections in social security and health administration are unheard of.⁴

There is a difference of opinion about the value of the inspection of the courts. Some officials think it is useful; others think that an inspection which occurs once in 10 years is of little value. Little can be gained for our purposes in considering the functions of the Swedish Ombudsman as an inspector in relation to our court system which is so very

³Until recently there have been two Ombudsmen—an Ombudsman for civil affairs and an Ombudsman for military affairs. There are now three Ombudsmen who have jurisdiction over both civil affairs and military affairs.

⁴Gellhorn, *Ombudsmen and Others*, 219.

different from that of Sweden. In Ontario we have a very efficient Inspector of Legal Offices who performs his duties with respect to the administrative processes of the courts with much more regularity than the Ombudsman does in Sweden. The need of consultation with and advice to the judges, said to be met through the visits of the Swedish Ombudsman, is in large measure much more adequately met in this Province by the special relationship that exists with the legal profession and through meetings and seminars of judges sponsored by the Government where mutual problems of practice and interpretation of statutes are discussed.

THE SUPERVISION OF THE COURTS

The Ombudsman has very definite supervisory duties with respect to the courts. He can and has prosecuted judges for "the crime of breach of duty". This may involve the conduct of the judge or his failing to follow legal procedure. There are cases on record where the Ombudsman has prosecuted judges of the Court of Appeal and the Trial Courts. A case is recorded where the Ombudsman prosecuted a judge who applied a statute that had been repealed.

These functions of the Ombudsman have to be considered in relation to a different constitutional concept of the separation of judicial powers than that which exists in Canada. The judge in Sweden is more analogous to a civil servant than a judge in Canada. In fact, we interviewed an experienced judge of the Swedish Court of Appeal who at that time had been an officer of the Department of Justice for over 10 years but was still known as an associate judge of the Court of Appeal.

Judges serve out an apprenticeship of approximately 15 years performing judicial duties in different courts before they are confirmed in their appointment. During this time they may participate actively in politics and they may be members of political parties. In Canada tradition and a strong public opinion exercises a discipline over the judges that has a very considerable effect. We shall discuss later whether additional safeguards against judicial incompetence or dereliction in duty are necessary in this Province.

RELATIONS WITH THE PRESS

Since the files of public offices are open to the press it follows that those of the Ombudsman may be inspected by the members of the press. Professor Gellhorn says that a reporter for the Swedish press visits the office of the Ombudsman daily to examine the incoming mail which is sometimes seen by the reporter before it is seen by the Ombudsman. The members of the press also see outgoing mail and sometimes publish the facts before they are investigated.⁵ This statement is not quite consistent with what Mr. Bexelius told us as to matters under consideration. He said these were not subject to scrutiny by the press. But be that as it may, the practice has been the subject of bitter denunciation by the civil service in Sweden. Whatever the merits of the controversy may be we do not think that the process by which those engaged in the public service may be put on "trial by newspaper" with or without an opportunity of being heard would promote good government in this Province.

⁵*Ibid.*, 228.

CHAPTER 89

The Office of Ombudsman in Denmark

UNLIKE Sweden, Ministers in Denmark exercise ultimate administrative power over their departments and they are politically answerable to Parliament although they need not be members of Parliament.

When the office of Ombudsman was created in 1954 the administrators in the processes of government were almost entirely free from statutory control. It was not until 1964 when an Administrative Procedure Act was passed that parties to administrative procedures, either local or national, were given an opportunity to be heard or to make oral or written submissions.¹ Denmark has no administrative courts. The ordinary courts are resorted to for relief. The official who has abused his powers may be prosecuted in the courts which have disciplinary powers, including power to remove him from office. While there are powers of judicial review somewhat akin to the common law powers exercised in this Province, the principle of the statutory right of appeal to the courts has not been developed as it has been here.

The office of the Ombudsman in Denmark has attracted widespread attention in common law countries mainly because of the personality of its holder, Stephan Hurwitz, LL.D., who has been in office since its inception, and the fact that the constitution within which he works bears attributes

¹Gellhorn, *Ombudsmen and Others*, 9

somewhat similar to those of the common law democracies. We had the privilege of conferring with Mr. Hurwitz as to the administration of his office and with Judge G. Jensen who was Deputy Ombudsman in Denmark for some time.

THE LEGAL BASIS OF THE OFFICE

In the revision of the Danish Constitution in 1953 it was provided that "By statute there shall be a provision for the election by Parliament of one or two persons who shall not be members of Parliament, to control the civil and military administration of the State."²

By an Act of Parliament passed in 1954 provision was made for one person to perform these duties. He has been known as the Ombudsman. In mediæval Danish language "An Ombudsman" meant an official who on behalf of the King took care of the administration of certain territory. In contemporary language it means "a person who on behalf of Parliament supervises public administration—both civil and military". In 1961 the jurisdiction of the Ombudsman was extended to the supervision of departments and agencies of local government.

Under the Act, Parliament was authorized to lay down certain rules for the conduct of the affairs of the Ombudsman. These have been codified into directives. It follows that the legal foundation for the office in Denmark is the Constitution, the Ombudsman Act and the directives.

THE FUNCTIONS OF THE OMBUDSMAN

In theory the Ombudsman has the confidence of Parliament and acts on behalf of Parliament. He is appointed by Parliament and may be dismissed by Parliament. His term of office does not extend beyond the life of a Parliament and he must be re-elected after each general election. The holder of the office must have legal education. At the present time the Ombudsman has a staff of eleven, six of whom are legally qualified. Unlike the former practice in Sweden, where there

²Article 5.

was a civil and military Ombudsman, one such officer serves as Ombudsman for all government services.

Under the Constitution the Ombudsman is required to keep himself informed as to whether persons under his supervision commit mistakes or acts of negligence in the performance of their duties.³ These duties are set out in more detail in the directives. It is prescribed that the task of the Ombudsman shall be to keep himself informed as to whether any person under his authority pursues unlawful ends, makes arbitrary or unreasonable decisions or otherwise commits mistakes or acts of negligence in the discharge of his or her duties.⁴ This directive is not only designed to give the Ombudsman jurisdiction with respect to illegal acts but to give some supervision over discretionary decisions which may be either arbitrary or unreasonable.

There is no judicial control in Denmark over the exercise of discretionary powers. This is not entirely true in Ontario.⁵

SCOPE OF THE OMBUDSMAN'S AUTHORITY

Central Government

The Ombudsman has no authority over Parliament or the law courts. Under the Act his authority extends to civil servants and all other persons acting in the service of the state. He has authority over Ministers acting in a routine administrative capacity but no authority with respect to political decisions. He does not state his views on any matters of political controversy or give opinions on the constitutionality of laws passed by Parliament.

Local Government

Complaints with respect to matters coming within the areas of local government presupposes that recourse may be

³*Ibid.*

⁴Directives, s. 3.

⁵See *re Brampton Jersey Enterprises Ltd. v. Milk Control Board of Ontario*, [1956] O.R. 1; *LaRush v. Metropolitan Toronto & Region Conservation Authority*, [1968] O.R. 300; *Wilcox v. Township of Pickering, et al.*, [1961] O.R. 739; *Re Cities Service Oil Co. Ltd. v. City of Kingston*, [1956] O.W.N. 804 and *Padfield v. Minister of Agriculture*, [1968] A.C. 997 discussed by Professor H. W. R. Wade in 84 L.Q.R. 166.

had to the central government when all administrative remedies have been exhausted. Decisions of a local government council acting as a body are, as a rule, outside the authority of the Ombudsman even if recourse may be had to the central government. It is only when the Ombudsman finds that a case involves violation of a material legal interest that the Ombudsman will take up a case with respect to local government. The Ombudsman Act lays down the principle that in the exercise of his powers he shall take into account the special conditions under which local governments act.

COMPLAINTS

Complaints may be lodged with the Ombudsman by any one. They must be in writing and need not be by the party to the case or one that possesses a legal interest in it. Those deprived of their liberty may write to the Ombudsman without their letters being opened by any person other than the Ombudsman or members of his staff.

The Act provides that complaints cannot be lodged against decisions which may be set aside by a superior authority until the superior authority has dealt with the case. This does not prevent the Ombudsman taking up the case on his own initiative or investigating a complaint before it is dealt with by the superior authority if a complaint is against a subordinate authority concerning the treatment of a case or against a civil servant concerning his behavior.

Procedure

The procedure governing the making of complaints is simple.

- (1) As far as possible the complaint should be in writing accompanied by the complainant's name and address and the evidence to support it.
- (2) As a rule anonymous complaints will not be dealt with but if sufficient grounds are shown the Ombudsman may take up the case as one on which he proceeds on his own initiative.

- (3) The complaint must be lodged within one year after the matter complained of arose.
- (4) There is no time limit on the right of the Ombudsman to take up a case on his own initiative.

Out of 5,248 cases registered in the Ombudsman's office during the five years, 1959-1963, only 46 were taken up for investigation on the Ombudsman's own initiative.

THE OMBUDSMAN'S POWERS

The Ombudsman has wide powers of investigation but limited powers of other action. His powers of investigation are somewhat similar to the powers of a commissioner appointed under the Public Inquiries Act of Ontario except the powers of testimonial compulsion.⁶ His powers of compulsion are to subpoena persons to give evidence before a court of law on any matter which has a bearing on his investigation. To date it is said that this power has never been exercised as the Ombudsman has always preferred to get information informally. Investigations are not conducted in public.

Unlike the Swedish practice, as a correlative of the right to get information the Ombudsman is required to keep secret any matter coming within his knowledge in the performance of his duties and this obligation continues to exist after he has resigned his office. All members of his staff are obliged to observe secrecy.

The powers of the Ombudsman other than those of investigation are much more limited than those of the Swedish Ombudsman. Where he finds that the conduct of a civil servant is of such a nature as to warrant disciplinary action he may order the administrative authorities to institute a disciplinary investigation. If he finds any person under his supervision has committed a crime in the public service he may order the prosecuting authorities to institute preliminary investigations and lay a charge in the ordinary courts. However, if he finds that a Minister, or a former Minister, should be held civilly or criminally liable for his conduct he must

⁶See Chapters 30 and 32 *supra*.

submit his recommendation to the Parliamentary Committee on the Ombudsman. Up to the time of our investigation of the Danish system it had not been found necessary to exercise any of the powers that we have just been discussing, other than the investigatory powers.

Where the Ombudsman finds that a matter being investigated comes within the jurisdiction of the courts he may recommend free legal aid. Where any mistake or act of negligence of major importance comes to his knowledge he shall inform Parliament and the Minister of the relevant department and make recommendations for the improvement of the administrative process.

The duties of the Ombudsman in Denmark must be considered in the light of the fact that there are no administrative courts in Denmark and review of administrative acts by the courts is limited to questions concerning their legality. The Ombudsman has, therefore, wide powers to investigate areas of discretionary orders. Professor Hurwitz told us that the most frequent complaints have arisen out of alleged interference with the privacy of the citizen by police. He investigates cases of alleged conflict of interest. This would appear to have a disciplinary effect. In fact, Professor Hurwitz felt that the existence of this power to investigate was the most important feature of his office.

The Ombudsman has no disciplinary power over the judges. Complaints against judges are heard by a special Court of Complaints which we shall discuss later.

There is a special statutory duty to inform Parliament or the local government councils, as the case may be, of defects in the laws or their administration and their bylaws. He may also propose measures which he finds useful for the promotion of law and order or the improvement of administration. He does not prepare bills or make statements on political questions but he may call the attention of Parliament, the Ministers or local government councils to technical errors in the law and administrative failings or defects. Since Denmark has an Administrative Procedure Act one of the functions of the Ombudsman is to correct civil servants when they do not comply with the rules.

Wherever the Ombudsman makes a report against a civil servant he is required to set out in his report what the individual has put forward in his defence.

Of 1,130 cases registered in 1963, 979 were dismissed. Of those dismissed 54 were lodged too late and 313 were outside the scope of the authority of the Ombudsman. 166 were dismissed because administrative remedies had not been exhausted. 254 coming within the scope of the Ombudsman's authority were unfounded or the subject matter was insignificant. The net result was that of the 1,130 only 151 were taken up for investigation.

Upon being asked his own views as to the office of Ombudsman Professor Hurwitz said that if he had to start over again he would recommend that the Ombudsman should have power to criticize all decisions by the state or local administrators, but not the courts.

CHAPTER 90

The Office of Parliamentary Commissioner in New Zealand

NEW ZEALAND was the first country with a parliamentary system in the British tradition to create the office of Ombudsman. During a political campaign in 1960 the then opposition party issued a declaration which stated in part, "To ensure that members of the public in dealing with Departments of State have the right and opportunity to obtain independent review of administrative decisions, the National Party proposes to establish an appeal authority. Any person concerned in an administrative decision may have the decision reviewed. The procedure will be simple . . . The appeal authority will be an independent person or persons responsible not to Government but to Parliament . . ."¹ The party that issued this declaration was elected to power and was responsible for fulfilling this campaign promise. As a fulfillment of the promise an Act was passed in 1962, creating the office of Parliamentary Commissioner (or Ombudsman). (To avoid confusion we shall refer to the holder of the office as the "Ombudsman".) As we shall see, the fulfillment was a mere shadow of the promise. The Ombudsman is not an "appeal authority" and administrative decisions are not reviewed in

¹Gellhorn, *Ombudsmen and Others*, 101.

the sense that the Ombudsman exercises any appellate power or power to reverse a decision or to impose sanctions or to grant relief. His functions are to investigate, persuade, and, in proper cases, to report with respect to decisions made in wide areas of government but not in all areas of government or government administration.

In drafting the Act the government followed to a certain extent the Danish pattern. The Ombudsman is appointed by Parliament and may only be removed or suspended from his office by the Governor-General upon an address from the House of Representatives for disability, bankruptcy, neglect of duty or misconduct. If Parliament is not in session the Governor-General-in-Council has powers of suspension.²

THE FUNCTIONS OF THE OMBUDSMAN

The principal function of the Ombudsman is to investigate any decision or recommendation including any recommendation to a Minister of the Crown or any act done or omitted relating to a matter of administration affecting any person or body of persons in his or its personal capacity in or by any of the departments or organizations named in the Schedule to the Act. His powers extend to decisions of officers, employees and members of the bodies referred to in the Act.³ He may act on a complaint or on his own motion,⁴ or on references made by a committee of the House of Representatives.⁵

The Ombudsman is expressly prohibited from investigating any matter where there is a right of appeal or a right of review on the merits of a case to or by any court or any other tribunal whether the right is exercised or not.⁶ Decisions and recommendations made by trustees whether public or private may not be investigated nor those of legal advisers to the Crown made in the conduct of Crown business. Broadly speaking, the Ombudsman does not have jurisdiction with respect to matters relating to members of the armed services.⁷

²Statutes of New Zealand 1962, No. 10, s. 5.

³*Ibid.*, s. 11(1).

⁴*Ibid.*, s. 11(2).

⁵*Ibid.*, s. 11(3).

⁶*Ibid.*, s. 11(5) (a).

⁷*Ibid.*, s. 11(5).

COMPLAINTS

Every complaint to the Ombudsman shall be in writing and a fee of one pound shall be paid with each complaint unless the Ombudsman on account of the special circumstances of the case directs that no fee be payable. Inmates of prisons and mental institutions are permitted to write to the Ombudsman without their communications being opened by any person other than the Ombudsman or members of his staff.⁸ He is not required to investigate all complaints coming within his jurisdiction. He may refuse to do so if it appears to him,

- (a) there is under the law or administrative practice an adequate remedy by way of appeal; or
- (b) if he thinks further investigation is unnecessary; or
- (c) if the complaint relates to a decision or matter of which the complainant has had knowledge for more than 12 months; or
- (d) if the subject matter of the complaint is trivial or the complaint is frivolous or vexatious; or
- (e) the complainant has not sufficient interest in the subject matter.⁹

Procedure in Dealing with Complaints

There are certain well-defined rules of procedure laid down in the Act to be followed in investigating complaints. The investigation shall be in private. The Ombudsman is not required to hold a hearing and no person is entitled as of right to be heard, except before an adverse report or recommendation is made affecting any department, organization or person, the department, organization or person in question shall be given an opportunity to be heard. The Ombudsman may consult any Minister interested in the investigation and he shall on the request of any Minister consult him in relation to any investigation. Where it would appear that the subject matter under investigation was a decision, recommendation, act or omission that would require the Ombudsman to report

⁸*Ibid.*, s. 13.

⁹*Ibid.*, s. 14.

to the appropriate authority as being one that is unreasonable, unjust, oppressive, discriminatory, based wholly or partly on mistake of law or fact or that it was wrong the relevant Minister must be consulted before a final opinion is formed.¹⁰

The Ombudsman has power to require production of documents and to require the attendance of the complainant or any officer or employee or any member of any department or organization within his jurisdiction and to examine such persons under oath. Other persons, who in the opinion of the Ombudsman may be able to give relevant information may be examined if prior approval is obtained from the Attorney-General.¹¹

There is express provision against the evidence given on an investigation being used against the person giving such evidence in subsequent proceedings.¹²

With the exception of such matters that may be disclosed in any report made by the Ombudsman he and his staff are required to maintain secrecy with respect to all matters that come to their knowledge in the exercise of their functions.¹³

ACTION

When the Ombudsman considers that an investigation has disclosed something requiring further consideration three steps must be followed.

- (1) He shall report his opinion and reasons therefore to the appropriate department of government or organization with such recommendations as he thinks fit;
- (2) He may require the department or organization to notify him within a specified time, stating what it proposes to do about his recommendation.
- (3) If no action is taken that in the opinion of the Ombudsman is adequate, he may send a copy of the report to the Prime Minister and he thereafter may make such report to Parliament as he thinks fit. Any comments made by the

¹⁰*Ibid.*, s. 15.

¹¹*Ibid.*, s. 16.

¹²*Ibid.*, s. 16(6).

¹³*Ibid.*, s. 18.

department or organization involved must be attached to the report.¹⁴

Curiously enough, the Act that was designed to fulfill the promise of ensuring that "members of the public in dealing with Departments of State have the right and opportunity to obtain an independent review of administrative decisions" contains the following clause:

"No proceeding of the Commissioner (Ombudsman) shall be held bad for want of form, and, except on the ground of lack of jurisdiction, no proceeding or decision of the Commissioner (Ombudsman) shall be liable to be challenged, reviewed, quashed, or called in question in any Court."¹⁵

NATURE OF JURISDICTION EXERCISED

The jurisdiction of the Ombudsman does not extend to all departments of government. The following is a list of departments and organizations to which the Act extends.

Government Departments

The Air Department.
 The Army Department.
 The Audit Department.
 The Crown Law Office.
 The Customs Department.
 The Department of Agriculture.
 The Department of Education.
 The Department of External Affairs.
 The Department of Health.
 The Department of Industries and Commerce.
 The Department of Internal Affairs.
 The Department of Island Territories.
 The Department of Justice.
 The Department of Labour.
 The Department of Lands and Survey.
 The Department of Maori Affairs.
 The Department of Scientific and Industrial Research.
 The Department of Statistics.
 The Government Life Insurance Office.
 The Government Printing Office.
 The Inland Revenue Department.
 The Law Drafting Office.

¹⁴*Ibid.*, s. 19 (3)(g).

¹⁵*Ibid.*, s. 21.

The Legislative Department.
 The Maori Trust Office.
 The Marine Department.
 The Mines Department.
 The Ministry of Works.
 The Navy Department.
 The New Zealand Electricity Department.
 The New Zealand Forest Service.
 The New Zealand Government Railways Department.
 The Office of the Public Service Commission.
 The Police Department.
 The Post Office.
 The Prime Minister's Department.
 The Public Trust Office.
 The Social Security Department.
 The State Advances Corporation of New Zealand.
 The State Fire and Accident Insurance Office.
 The Tourist and Publicity Department.
 The Transport Department.
 The Treasury.
 The Valuation Department.

Other Organizations

The Air Board.
 The Army Board.
 The Board of Management of the State Advances Corporation
 of New Zealand.
 The Board of Maori Affairs.
 The Earthquake and War Damage Commission.
 The Government Stores Board.
 The Government Superannuation Board.
 The Land Settlement Board.
 The Maori Purposes Fund Board.
 The National Parks Authority.
 The National Provident Fund Board.
 The National Roads Board.
 The New Zealand Naval Board.
 The New Zealand Army.
 The New Zealand Naval Forces.
 The Police.
 The Public Services Commission.
 The Rehabilitation Board.
 The Royal New Zealand Air Force.
 The Social Security Commission.
 The Soil Conservation and Rivers Control Council.
 The State Fire Insurance Board.

We had the privilege of two long conferences with Sir Guy Powles who was appointed to the office of Ombudsman when the Act came into force and has held the office continuously since then. He impressed us as a man distinguished for his ability and tact. In fact, it is said "the man has made the office."

New Zealand has no Administrative Procedure Act and, as we shall point out later, the philosophy of the right of appeal or review by a superior tribunal has not received the same attention in New Zealand as it has in the legislation of this Province. For example, Sir Guy told us that the social security laws produced the largest number of complaints. He said the general complaint is that if a person is entitled to a benefit but has not received it there is no appeal board for this type of legislation in New Zealand. Sir Guy said that, in fact, he acts as the appeal authority. As we shall discuss in more detail later means have been provided in Ontario for review in such cases.

The Ombudsman's report for the year ended March 31, 1968 gives a review of samples of complaints received and some of those which were investigated. Between October 1, 1962 and March 31, 1968, 3,882 complaints were received, an average of about 59 per month. Of these, 1,360 were rejected on the ground of lack of jurisdiction; 290 were rejected on the ground that other adequate remedies were available and 66 were rejected on the ground that they were trivial or frivolous. Three hundred and twenty-three complaints were withdrawn. Of those investigated 1,438 were found to be unjustified and 320 were considered to be justified. 85 complaints were still under investigation. Of 730 complaints made during the past year 57 were investigated and considered justified. This is an average of approximately 5 per month.

For the convenience of those who will be required to consider whether the recommendations of this Commission should be accepted, we set out below an extract from the Ombudsman's report for 1968 which gives a fair reflection of the character of his work.

SCHEDULE OF COMPLAINTS FOR THE YEAR ENDED 31 MARCH 1968

<i>No.</i>	<i>Subject of Complaint</i>	<i>Result</i>
AGRICULTURE (9)		
1511	Commercial discrimination	Discontinued 14 (1).
3043	Refund of superannuation contributions	Rectified.
3119	Restrictions on supply of turnip seed	Withdrawn.
3134	Testing of dairy herd for Tb	Not justified.
3238	Unfair treatment	Declined 14 (2).
3240	Level of wages paid	Rectified.
3457	Time taken to release imported seed	Withdrawn.
3461	Unfair treatment	Being investigated.
3482(a)	Lack of action on complaint made	Not justified.
CIVIL AVIATION (9)		
3261	Application for commercial pilot's licence ..	Not justified.
3280	Appointment of air traffic control officers ..	Not justified.
3397	Imposition of building restrictions	Declined 11 (5).
3442	Unauthorised landing of aircraft	Not justified.
3464	Report on aircraft accident	Withdrawn.
3580	Grant of examination credits	Not justified.
3595	Treatment as employee	Rectified.
3634	Renewal of private pilot's licence	Declined 11 (1).
3638	Grant of examination credits	Not justified.
CUSTOMS (41)		
2766	Classification of aircraft for duty purposes ..	Discontinued 14 (1).
3032(a)	Seizure of imported drugs	Withdrawn.
3040	Import licensing: sewing machines	Not justified.
3052	Confiscation of New Zealand currency	Discontinued 14 (1).
3063	Permit to procure pure methylated spirit	Rectified.
3098	Import licensing: vitamin tablets	Not justified.
3109	Disposal of smuggled goods	Withdrawn.
3133	Importation of motorcar	Not justified.
3142	Level of duty on imported car	Not justified.
3154	Application for "survival licences"	Discontinued 14 (1).
3155	Level of duty on imported car	Discontinued 14 (1).
3168	Unfair treatment	Withdrawn.
3200	Time taken to issue import licence	Withdrawn.
3228	Increase in sales tax on cars	Declined 11 (1).
3245	Import licensing: motorcycles	Not justified.
3255	Administration of Sales Tax Act	Not justified.
3256	Administration of Sales Tax Act	Not justified.
3267	Unfair treatment	Not justified.
3271	Duty charged on gift parcel	Not justified.
3272(a)	Difficulty in filling in official forms	Withdrawn.
3274	Time taken to effect Customs clearance	Withdrawn.
3275	Time taken to issue non-remittance licence	Not justified.
3306	Time taken to issue non-remittance licence	Not justified.
3322	Import licensing: overseas magazines	Rectified.
3357(b)	Import restrictions	Withdrawn.
3387	Permission to import bloodstock	Not justified.
3403	Importation of station wagon	Withdrawn.
3419	Import licensing: watches	Not justified.
3438	Seizure of goods	Not justified.

<i>No.</i>	<i>Subject of Complaint</i>	<i>Result</i>
CUSTOMS—continued		
3458	Level of duty charged	Withdrawn.
3462	Importation of motorcar	Discontinued 14 (1).
3490	Duty on reconditioned engines	Not justified.
3492	Level of duty on imported car	Not justified.
3523	Release of baggage	Withdrawn.
3530	Unfair treatment	Not justified.
3601	Duty charged on auto spare parts	Not justified.
3602	Level of duty on imported car	Withdrawn.
3614	Import licensing: cosmetic materials	Being investigated.
3622	Costs incurred through undue delay	Withdrawn.
3623	Unfair treatment	Rectified.
3656(b)	Clearance of parcels of imports	Discontinued 14 (1).
DEFENCE (13)		
3054(a)	Time taken to reply to complaint	Recommendation made.
3054(b)	Employment of overage officer	Declined 11 (6).
3113	Gratuity and re-engagement bonus	Declined 11 (6).
3139(b)	Treatment as trainee	Declined 11 (6).
3171	Payment of service bond	Declined 11 (6).
3208	Unfair treatment	Declined 11 (6).
3209(a)	Unfair treatment	Declined 11 (6).
3214	Unfair treatment	Declined 11 (6).
3221	Eligibility for award of Efficiency Decoration	Withdrawn.
3231	Termination of service	Declined 11 (6).
3353	Means of transportation from United Kingdom	Discontinued 14 (1).
3494	Unsatisfactory provision of rations	Declined 11 (6).
3583	Unfair treatment	Declined 11 (6).
EDUCATION (41)		
2628	Disability caused by injury at work	Discontinued 14 (1).
2884	Treatment as employee	Not justified.
2963	Issue of child care centre licence	Being investigated.
3007	Employment bonding of teachers	Not justified.
3037	Adoption of child	Discontinued 14 (1).
3041	Cancellation of married allowance	Not justified.
3042	Recognition of educational qualification	Not justified.
3046	Costs involved in caring for child	Not justified.
3070	Recognition of educational qualifications	Not justified.
3085	Extension of bursary	Not justified.
3102	Unfair treatment	Withdrawn.
3112	Eligibility for fees and allowances bursary ..	Not justified.
3122	Non-availability of examination paper	Not justified.
3137	Treatment as employee	Discontinued 14 (1).
3138	Eligibility for grant of boarding allowance ..	Not justified.
3148	Regulations governing grant of bursaries	Rectified.
3153	Eligibility for grant of boarding allowance ..	Not justified.
3157	Treatment as employee	Not justified.
3232	Damage to library book	Withdrawn.
3311	Sick leave entitlement	Rectified.
3312	Obligation under studentship bond	Not justified.
3320	Reimbursement of transfer expenses	Not justified.
3330	Eligibility for grant of bursary	Withdrawn.

<i>No.</i>	<i>Subject of Complaint</i>	<i>Result</i>
EDUCATION—continued		
3380	Obligation under teaching bond	Not justified.
3389	Regulations covering payment of removal expenses	Withdrawn.
3425(a)	Refusal of course study	Not justified.
3425(b)	Retention of paid fee	Rectified.
3524	Level of salary paid	Not justified.
3545	Level of salary paid	Being investigated.
3565	Control of delinquent child	Withdrawn.
3581	Obscure	Withdrawn.
3599	Time taken to establish school	Being investigated.
3624	Eligibility for grant of bursary	Not justified.
3654	Obligation under studentship bond	Being investigated.
3657	Unfair treatment	Being investigated.
3680	Treatment as employee	Being investigated.
3691	Compensation for property damage	Being investigated.
3695	Eligibility for grant of boarding allowance	Being investigated.
3706	Reinstatement of bursary	Being investigated.
3709	Treatment as employee	Being investigated.
3719	Time taken to reply to inquiry	Being investigated.
ELECTRICITY (5)		
2870(b)	Adverse effect of hydro scheme on farm lands	Discontinued 14 (1).
3184	Erection of power poles on farm	Rectified.
3417	Evidence given to Local Bills Committee	Withdrawn.
3437	Treatment as employee	Discontinued 14 (1).
3539	Erection of power pylon on property	Discontinued 14 (1).
EXTERNAL AFFAIRS (1)		
3459	Issue of misleading information	Withdrawn.
FOREST SERVICE (4)		
3427	Withholding of information	Rectified.
3592	Loss of employment	Withdrawn.
3637	Farm forestry encouragement loan scheme ..	Being investigated.
3711	Plantation spraying requirements	Being investigated.
GOVERNMENT LIFE INSURANCE OFFICE (2)		
3326	Payment of premium arrears	Not justified.
3716	Refusal of insurance proposal	Being investigated.
HEALTH (29)		
2913	Effects suffered from hypnosis	Not justified.
3045	Boarding-out of inmates	Not justified.
3093	Unfair treatment	Declined 14 (2).
3103	Time taken to establish rest home	Discontinued 14 (1).
3114	Divulging of confidential information	Withdrawn.
3161	Unfair treatment	Declined 11 (1).
3195	Committal to mental institution	Not justified.
3212	Committal to mental institution	Not justified.
3253	Committal to mental institution	Not justified.
3276	Withholding of information	Declined 11 (5).
3283	Retention in mental institution	Declined 11 (1).
3301	Refund of proportion of cancelled licence fee	Rectified.

<i>No.</i>	<i>Subject of Complaint</i>	<i>Result</i>
HEALTH—continued		
3307	Eligibility for free dental treatment	Not justified.
3318	Lack of action on complaint	Not justified.
3363	Charge levied for plastic eye	Not justified.
3373	Accident during stay in hospital	Not justified.
3376	Inaccuracies in salary payments	Not justified.
3384	Authorisation of erection of fertiliser works	Declined 11 (1).
3473	Repayment of study bursary	Not justified.
3482(b)	Lack of action on complaint	Not justified.
3538	Registration of private hospital	Being investigated.
3549	Liability for funeral expenses	Withdrawn.
3633	Detention in mental institution	Being investigated.
3661	Wasteful expenditure	Being investigated.
3677	Responsibility for mental patients on leave	Being investigated.
3696	Requirements for qualification as smoke inspector	Being investigated.
3697	Detention in mental institution	Being investigated.
3702	Eligibility for free dental treatment	Being investigated.
3704	Detention in mental institution	Being investigated.
INDUSTRIES AND COMMERCE (4)		
3032(b)	Inaction on price control	Withdrawn.
3066	Import licensing: knitting machine	Not justified.
3364	Unfair trade practice	Discontinued 14 (1).
3468	Time taken to return exhibits	Discontinued 14 (1).
INLAND REVENUE (30)		
3010	Provisions of Land and Income Tax Act	Being investigated.
3123	Income tax assessment	Declined 11 (5).
3132	Income tax assessment	Being investigated.
3217	Social security tax on United Kingdom pension	Not justified.
3225	Income tax exemption	Declined 14 (2).
3236	Income tax assessment	Declined 11 (5).
3298	Income tax assessment	Declined 11 (5).
3313	Tax rebate on transportation costs	Declined 11 (5).
3337	Tax on lump sum in lieu of retiring leave ..	Not justified.
3339	Income tax assessment	Declined 11 (5).
3345	Taxing of superannuation	Not justified.
3346	Income tax assessment	Declined 11 (5).
3347	Inability to obtain information	Not justified.
3358(a)	Income tax assessment	Declined 11 (5).
3375	Income tax assessment	Declined 11 (5).
3420	Liability for payment of tax	Declined 11 (5).
3477	Incidence of income tax	Withdrawn.
3499	Refund of income tax paid	Withdrawn.
3534	Income tax assessment	Declined 11 (5).
3535	Tax payable on overseas earnings	Withdrawn.
3537	Interpretation of statutory provisions	Declined 11 (5).
3540	Eligibility for grant of tax rebate	Discontinued 14 (1).
3563	Income tax assessment	Declined 11 (5).
3620	Exemption from social security tax	Not justified.
3628	Stamp Duty assessment	Declined 11 (5).
3672	Income tax assessment	Declined 11 (5).
3673	Liability for payment of gift duty	Declined 11 (5).

<i>No.</i>	<i>Subject of Complaint</i>	<i>Result</i>
INLAND REVENUE—continued		
3684	Income tax assessment	Declined 11 (5).
3701	Income tax assessment	Declined 11 (5).
3703	Income tax exemptions	Being investigated.
INTERNAL AFFAIRS (16)		
2155	Application for New Zealand citizenship	Rectified.
3073	Application for naturalisation	Not justified.
3089	Restrictions on issue of passport	Rectified.
3250	Refund of allowance paid	Discontinued 14 (1).
3316	Termination of employment	Withdrawn.
3371(b)	Treatment as employee	Being investigated.
3481	Obligation to register as alien	Not justified.
3532	Allocation of dates for trotting meetings	Not justified.
3555	Issue of passport	Not justified.
3569	Naturalisation	Being investigated.
3577	Operation of racecourse totalisators	Not justified.
3585	Cancellation of permit	Not justified.
3629	Restrictions on use of swimming aids	Declined 11 (1).
3655	Passport procedures	Being investigated.
3698	Naturalisation	Being investigated.
3725	Provisions of Counties Act	Being investigated.
JUSTICE (27)		
2403	Computation of sentences awarded	Not justified.
2410	Time taken to deposit plan	Discontinued 14 (1).
2469	Failure to act against company in liquidation	Discontinued 14 (1).
3019	Lack of action	Discontinued 14 (1).
3127(a)	Irregular maintenance payments	Not justified.
3145	Lodgment of survey plan	Declined 11 (5).
3159	Non-enforcement of Court order	Declined 11 (1).
3176	Permission to visit prison inmate	Not justified.
3210	Provisions of Secondhand Dealers Act 1963 ..	Not justified.
3270	Unfair treatment	Not justified.
3290	Survey requirements	Declined 11 (5).
3325	Non-payment of fee	Withdrawn.
3351	Efficacy of borstal training	Not justified.
3414	Unfair treatment	Withdrawn.
3436	Maintenance payments	Withdrawn.
3447	Obscure	Declined 11 (1).
3449	Disclosure of information	Withdrawn.
3452	Unfair treatment	Withdrawn.
3517	Registration of invalid rule	Withdrawn.
3522	Registration of invalid rule	Withdrawn.
3542	Notification of Court hearing	Not justified.
3546	Unfair treatment	Withdrawn.
3548	Delay in posting correspondence	Discontinued 14 (1).
3586	Treatment as prison inmate	Discontinued 14 (1).
3612	Transfer of prison inmate	Being investigated.
3651	Delay in restoring disqualified driver's licence	Being investigated.
3683	Maintenance payments	Being investigated.

<i>No.</i>	<i>Subject of Complaint</i>	<i>Result</i>
LABOUR (22)		
2524	Permission to enter New Zealand	Discontinued 14 (1).
2825	Permission to enter New Zealand	Rectified.
3055	Delay in sitting of Compensation Court	Discontinued 14 (1).
3095	Direction to leave New Zealand	Not justified.
3146	Call-up for military training	Withdrawn.
3166	Permission to enter New Zealand	Declined 11 (1).
3254	Unfair treatment	Not justified.
3289	Call-up for military training	Rectified.
3291(a)	Unfair treatment	Not justified.
3317	Permit to enter New Zealand	Not justified.
3381	Issue of misleading information	Declined 11 (5).
3388	Permission to enter New Zealand	Declined 11 (1).
3395	Permission to enter New Zealand	Not justified.
3422	Cancellation of assisted passage	Rectified.
3445	Permission to enter New Zealand	Declined 11 (1).
3455	Unfair treatment as immigrant	Not justified.
3520	Eligibility for assisted passage from United Kingdom	Rectified.
3528	Information available for intending immigrants	Withdrawn.
3536	Registration as industrial association	Discontinued 14 (1).
3588	Permission to enter New Zealand	Being investigated.
3604	Direction to leave New Zealand	Not justified.
3713	Permission to enter New Zealand	Being investigated.
LANDS AND SURVEY (11)		
2003	Provision of adequate access	Rectified.
2970	Permission to shoot on Crown land	Discontinued 14 (1).
3069	Incorrect description of land area	Discontinued 14 (1).
3227	Conditions covering Crown lease	Declined 11 (1).
3328	Application for appeal hearing	Not justified.
3374	Lease of Crown land	Discontinued 14 (1).
3404	Unfair treatment	Being investigated.
3423	Disposal of school property	Being investigated.
3466	Access to subdivision	Withdrawn.
3647	Unfair treatment	Being investigated.
3718	Unsatisfactory road access	Being investigated.
LEGISLATIVE (1)		
3105	Availability of statutes	Not justified.
MAORI AND ISLAND AFFAIRS (8)		
3260	Maori Land Amendment Bill	Declined 11 (1).
3273	Untidy state of property	Discontinued 14 (1).
3453	Rent collection from employees	Not justified.
3479	Eligibility for housing assistance	Not justified.
3516	Compensation for shipboard accident	Withdrawn.
3575	Interference with land drainage	Withdrawn.
3576	Interference with land drainage	Withdrawn.
3648	Non-payment of rates	Being investigated.
MARINE (8)		
2957	Unauthorised building on foreshore	Discontinued 14 (1).
3087	Construction of boat ramp	Not justified.
3118	Payment for hire of truck	Withdrawn.

<i>No.</i>	<i>Subject of Complaint</i>	<i>Result</i>
MARINE—continued		
3165	Enforcement of 3-mile fishing limit	Declined 14 (2).
3242	Treatment as employee	Discontinued 14 (1).
3252	Unfair treatment	Discontinued 14 (1).
3383	Attitude towards Police investigation	Discontinued 14 (1).
3518	Use of rubber exhaust lines on launches	Being investigated.
MINES (2)		
3144(a)	Refusal to grant lease	Declined 14 (2).
3333	Compensation for work injury	Declined 11 (1).
POST OFFICE (27)		
3074	Stoppage of payment on money order	Rectified.
3097	Savings bank withdrawals	Withdrawn.
3101	Unfair treatment	Not justified.
3127(b)	Cashing of money orders	Not justified.
3163	Compulsory registration of letter	Declined 14 (2).
3170	Treatment as employee	Declined 11 (5).
3175	Eligibility for higher-duty allowance	Discontinued 14 (1).
3206	Free issue of postal zone booklet	Declined 11 (1).
3244	Interest rate on investment account	Rectified.
3251	Change of telephone number	Not justified.
3262	Termination of tenancy	Not justified.
3268	Tenders for cleaning contract	Rectified.
3299(a)	Unsatisfactory handling of mail	Withdrawn.
3300	Payment of salary into trading bank	Withdrawn.
3327	Rental charges for party line telephone	Not justified.
3338	Eligibility for telephone rental concession ..	Rectified.
3369	Treatment as employee	Not justified.
3385	Inability to obtain re-employment	Not justified.
3478	Inland postage rates	Discontinued 14 (1).
3487	Treatment as employee	Not justified.
3547	Refusal to supply testimonial	Rectified.
3558	Procedures governing promotion	Declined 11 (5).
3593	Recognition of apprentice training	Being investigated.
3645	Unfair treatment	Rectified.
3656(a)	Clearance of overseas parcels	Discontinued 14 (1).
3665	Liability for toll calls	Being investigated.
3722	Time taken to pay overtime	Being investigated.
PUBLIC TRUST OFFICE (7)		
3104	Administration of estate	Declined 11 (5).
3164	Administration of estate	Declined 11 (5).
3194	Time taken to answer letters	Discontinued 14 (1).
3215	Administration of estate	Declined 11 (5).
3302	Administration of estate	Declined 11 (5).
3507	Administration of estate	Declined 11 (5).
3526(a)	Administration of estate	Declined 11 (5).
RAILWAYS (20)		
2833	Discriminatory freight rates	Not justified.
2859	Earth removal contract	Not justified.
2978	Entitlement to retiring leave	Not justified.
2987	Treatment as employee	Not justified.
3068	Compensation for work injury	Withdrawn

No.	Subject of Complaint	Result
RAILWAYS—continued		
3120	Non-acceptance of tender submitted	Not justified.
3219	Treatment as employee	Discontinued 14 (1).
3259	Claim for payment of Court costs	Declined 11 (5).
3277	Purchase of freehold	Rectified.
3348	Restriction on parking of private cars	Withdrawn.
3359	Entitlement to retrospective salary increase	Not justified.
3377	Eligibility to receive tradesman's pay	Not justified.
3402	Leave entitlement	Rectified.
3415	Erection of hoardings adjacent to highways	Being investigated.
3474	Treatment as employee	Not justified.
3552	Loss of goods in transit	Withdrawn.
3596	Appeal Board procedures	Declined 14 (2).
3635(a)	Provision of housing accommodation	Declined 14 (2).
3671	Treatment as employee	Being investigated.
3699	Retiring leave entitlement	Being investigated.
SCIENTIFIC AND INDUSTRIAL RESEARCH (1)		
3144(b)	Inaccurate sampling of coal	Not justified.
SOCIAL SECURITY (87)		
2483	Reduction of benefit by overseas pension	Discontinued 14 (1).
2543	Unfair treatment	Recommendation made.
2768	Reduction of benefit by overseas pension	Discontinued 14 (1).
2857	Eligibility for grant of benefit	Not justified.
2907	Cancellation of benefit	Discontinued 14 (1).
2993	Reduction of benefit by overseas pension	Discontinued 14 (1).
2997	Cancellation of benefit	Not justified.
3008	Withholding of pension payments	Not justified.
3022	Grounds on which benefit declined	Not justified.
3027	Refund of sickness benefit	Not justified.
3049	Time taken to make benefit payments	Justified—no recommendation made.
3056	Capitalisation of family benefit	Not justified.
3062	Eligibility for grant of benefit	Not justified.
3086	Capitalisation of family benefit	Not justified.
3092	Eligibility for grant of benefit	Not justified.
3099	Payment of benefit for period of absence	Not justified.
3116	Eligibility for grant of benefit	Not justified.
3128	Eligibility for grant of benefit	Not justified.
3131	Eligibility for financial assistance	Not justified.
3143	Reciprocity in health services	Discontinued 14 (1).
3156	Payment of benefit for period of absence	Not justified.
3160	Recovery of overpaid benefit	Not justified.
3162	Capitalisation of family benefit	Not justified.
3185	Eligibility for grant of benefit	Not justified.
3188	Reduction in age benefit	Not justified.
3197	Assistance towards hospitalisation expenses ..	Not justified.
3201	Time taken to pay benefit owing	Discontinued 14 (1).
3207	Withdrawal of supplementary assistance	Not justified.
3211	Eligibility for grant of benefit	Not justified.
3213	Commencing date for payment of benefit ..	Not justified.
3224	Level of allowable income	Not justified.
3229	Eligibility for grant of benefit	Not justified.
3235	Eligibility for grant of supplementary assistance	Not justified.

<i>No.</i>	<i>Subject of Complaint</i>	<i>Result</i>
SOCIAL SECURITY—continued		
3241	Reduction of benefit by overseas pension ..	Not justified.
3257	Payment of benefit for period of absence ..	Not justified.
3264	Eligibility for grant of assistance	Not justified.
3266	Eligibility for grant of benefit	Not justified.
3286	Issue of misleading information	Not justified.
3288	Cancellation of benefit order	Not justified.
3304	Eligibility for grant of unemployment benefit	Not justified.
3324	Capitalisation of family benefit	Not justified.
3331	Level of allowable income	Declined 11 (1).
3390(a)	Commencing date for payment of benefit ..	Rectified.
3392	Eligibility for grant of benefit	Not justified.
3394	Eligibility for grant of benefit	Not justified.
3410	Lack of welfare service	Declined 11 (1).
3411	Capitalisation of family benefit	Not justified.
3412	Commencing date for payment of benefit ..	Not justified.
3418	Eligibility for grant of benefit	Not justified.
3424	Eligibility for grant of benefit	Being investigated.
3428	Capitalisation of family benefit	Not justified.
3429	Arrears of family benefit	Not justified.
3440	Cancellation of benefit	Not justified.
3441	Time taken to reply to correspondence	Not justified.
3454	Commencing date for payment of benefit ..	Withdrawn.
3480	Recovery of overpaid benefit	Not justified.
3505	Eligibility for grant of assistance	Discontinued 14 (1).
3508	Capitalisation of family benefit	Not justified.
3510	Eligibility for grant of benefit	Not justified.
3519	Level of allowable income	Not justified.
3521	Capitalisation of family benefit	Not justified.
3531	Level of benefit payable	Rectified.
3570	Eligibility for grant of benefit	Not justified.
3578	Statutory provisions governing family benefit	Not justified.
3579	Capitalisation of family benefit	Not justified.
3582	Reduction of benefit	Discontinued 14 (1).
3597	Level of allowable income	Not justified.
3598	Reduction of benefit by overseas pension	Discontinued 14 (1).
3600	Eligibility for grant of benefit	Rectified.
3605	Eligibility for grant of benefit	Discontinued 14 (1).
3608	Eligibility for grant of unemployment benefit	Being investigated.
3611	Commencing date for payment of benefit ..	Not justified.
3626	Eligibility for grant of benefit	Not justified.
3631	Reduction of benefit by overseas pension	Being investigated.
3632	Commencing date for payment of benefit ..	Being investigated.
3639	Commencing date for payment of benefit..	Being investigated.
3640	Unfair treatment	Withdrawn.
3650	Eligibility for grant of benefit	Being investigated.
3652	Capitalisation of family benefit	Not justified.
3659	Recovery of sickness benefit paid	Being investigated.
3669	Level of benefit paid	Not justified.
3670	Recovery of overpaid benefit	Being investigated.
3682	Commencing date for payment of benefit ..	Not justified.
3700	Reduction of benefit by maintenance payments	Being investigated.

<i>No.</i>	<i>Subject of Complaint</i>	<i>Result</i>
SOCIAL SECURITY—continued		
3707	Eligibility for grant of benefit	Rectified.
3715	Eligibility for grant of benefit	Being investigated.
3720	Capitalisation of family benefit	Being investigated.
STATE ADVANCES CORPORATION (18)		
3072	Level of interest rate on loan	Not justified.
3152	Level of interest rate on loan	Discontinued 14 (1).
3174	Eligibility for housing loan	Withdrawn.
3191	Refund of war damage premium	Not justified.
3218	Level of rent increase	Withdrawn.
3281	Foreclosure of mortgage	Rectified.
3315	Provision of State rental accommodation ..	Justified—no recommendation made.
3323	Eligibility for State rental accommodation ..	Not justified.
3336	Unfair treatment	Not justified.
3391	Inadequate inspection of building work	Not justified.
3396	Refund of war damage premium	Not justified.
3451	Eligibility for housing loan	Rectified.
3484	Withdrawal of rent concession	Not justified.
3513	Eligibility for housing loan	Not justified.
3554	Eligibility for housing loan	Being investigated.
3635(b)	Provision of housing accommodation	Declined 14 (2).
3653	Insurance against death of mortgagee	Withdrawn.
3664	Refund of suspensory loan	Being investigated.
STATE INSURANCE OFFICE (8)		
3140	Vehicle damage claim	Declined 11 (1).
3284	Insurance cover on fishing trawler	Discontinued 14 (1).
3357(a)	Refund of overpaid premiums	Withdrawn.
3434	Claim under insurance policy	Not justified.
3559	Compensation for work injury	Declined 14 (2).
3589	Claim for accident repairs	Withdrawn.
3618	Rendering of account for trivial amount	Rectified.
3621	Vehicle damage claim	Declined 11 (5).
TRANSPORT (12)		
3124	Motor spirit rebate	Discontinued 14 (1).
3126	Traffic accidents	Declined 11 (1).
3149	Award of demerit points	Not justified.
3151	Termination of employment	Not justified.
3192	Unfair treatment	Withdrawn.
3329	Statutory penalties for traffic offences	Not justified.
3334	Unfair prosecution	Not justified.
3443	Unreasonable prosecution	Declined 11 (1).
3496	Vehicle ownership transfer fees	Declined 11 (1).
3525	Unfair treatment	Not justified.
3615	Discriminatory treatment	Not justified.
3662	Unfair traffic prosecution	Declined 11 (1).
TREASURY (5)		
2896	Interest charges on drainage scheme loan	Discontinued 14 (1).
2971	Sewerage service charges levied on schools ..	Withdrawn.
3272(b)	Difficulty in filling in official forms	Withdrawn.
3504	Restrictions on sale of 2-cent coins	Declined 11 (1).
3674	Retention of estate monies	Being investigated.

1370 *Parliamentary Commissioner in New Zealand*

<i>No.</i>	<i>Subject of Complaint</i>	<i>Result</i>
VALUATION (2)		
3147	Issue of separate valuations for flats	Withdrawn.
3450	Property valuation	Declined 11 (5).
WORKS (20)		
2724	Flooding resulting from road works	Discontinued 14 (1).
2861	Unfair treatment as employee	Recommendation made.
2870(a)	Adverse effect of hydro scheme on farm lands	Rectified.
2893	Permission to erect advertising sign	Rectified.
3079	Classification of creditors for payment purposes	Discontinued 14 (1).
3203	Purchase of property on motorway route ...	Discontinued 14 (1).
3230	Time taken to refund superannuation contribution	Discontinued 14 (1).
3285	Time taken to effect property settlement ...	Declined 11 (1).
3295	Compensation for land taken for roading ...	Not justified.
3335	Removal of "ministerial requirement"	Withdrawn.
3342	Time taken to issue tax form	Withdrawn.
3366	Unauthorised use of equipment	Withdrawn.
3465	Costs incurred through additional surveys ..	Recommendation made.
3469	Loss of business because of roading works ...	Withdrawn.
3527	Time taken to pay salary arrears	Rectified.
3544	Taking of land for roading purposes	Being investigated.
3550	Unfair treatment	Discontinued 14 (1).
3553	Payment for roofing contract	Withdrawn.
3556	Costs incurred in negotiations	Not justified.
3568	Time taken to conclude property deal	Being investigated.
DECIMAL CURRENCY BOARD (4)		
3319	Conversion of cash register	Not justified.
3430	Conversion of adding machine	Not justified.
3472	Restriction on sale of coins	Declined 11 (1).
3476	Restriction on sale of coins	Declined 11 (1).
EARTHQUAKE AND WAR DAMAGE COMMISSION (2)		
3130	Claim for damage to shearing shed	Not justified.
3529	Claim for damage caused by wind	Discontinued 14 (1).
GOVERNMENT SUPERANNUATION BOARD (10)		
3083	Retention of membership of Fund	Not justified.
3205	Inability to obtain definite information	Rectified.
3209(b)	Level of retiring allowance	Not justified.
3332	Retention of membership of Fund	Recommendation made.
3367	Eligibility to purchase previous service	Not justified.
3390(b)	Late issue of advice	Not justified.
3439	Increase in retiring allowance	Declined 11 (1).
3485	Interest on withdrawn contributions	Discontinued 14 (1).
3501	Variation in monthly payments	Withdrawn.
3676	Unfair treatment	Being investigated.
LAND SETTLEMENT BOARD (2)		
1532	Review of loan charges	Not justified.
3360	Issue of inaccurate advice	Rectified.

<i>No.</i>	<i>Subject of Complaint</i>	<i>Result</i>
NATIONAL PROVIDENT FUND BOARD (2)		
3198	Unfair treatment	Not justified.
3407	Eligibility to retire on full pension	Not justified.
NATIONAL ROADS BOARD (2)		
2555	Responsibility for fencing highway frontage	Discontinued 14 (1).
3050	Restrictions on land affected by motorway ..	Being investigated.
POLICE (22)		
3014	Impounding of firearm	Withdrawn.
3024	Investigation of traffic offence	Not justified.
3064	Issue of incorrect information	Not justified.
3100	Operation of security escort service	Rectified.
3139(a)	Unfair treatment	Not justified.
3187	Treatment as employee	Not justified.
3199	Application to join Police Force	Not justified.
3291(b)	Unfair treatment	Not justified.
3297	Retention of personal belongings	Not justified.
3386	Unfair treatment	Not justified.
3405	Lack of action on complaint	Not justified.
3408	Application for re-entry to force	Not justified.
3433	Persecution, arrest, and committal	Not justified.
3483	Unfair treatment	Not justified.
3498	Failure to prosecute	Discontinued 14 (1).
3502	Restrictions on Sunday drinking	Discontinued 14 (1).
3627	Reimbursement of witnesses expenses	Being investigated.
3644	Level of compensation offered	Being investigated.
3666	Release of confidential information	Being investigated.
3693	Divulging of information	Being investigated.
3712	Unfair prosecution	Being investigated.
3721	Unfair prosecution	Being investigated.
REHABILITATION BOARD (2)		
3379	Eligibility for grant of assistance	Rectified.
3486	Delay in providing information	Rectified.
STATE SERVICES COMMISSION (39)		
2886	Compensation for work disability	Discontinued 14 (1).
2899	Retiring leave entitlement	Rectified.
3005	Inability to obtain employment	Not justified.
3015	Level of departmental house rent	Not justified.
3020(a)	Reduction in retiring allowance	Not justified.
3020(b)	Eligibility for resigning leave	Rectified.
3023	Treatment as employee	Rectified.
3061	Eligibility to receive motherhood allowance	Recommendation made.
3071	Eligibility for retiring leave	Withdrawn.
3090	Treatment as employee	Not justified.
3111	Treatment as employee	Withdrawn.
3121	Treatment as employee	Not justified.
3248	Level of resigning leave granted	Not justified.
3282	Treatment as employee	Justified—no recommen- dation made.
3294	Retiring leave entitlement	Not justified.

<i>No.</i>	<i>Subject of Complaint</i>	<i>Result</i>
<i>STATE SERVICES COMMISSION—continued</i>		
3350	System of marking for merit purposes	Not justified.
3365	Level of salary paid	Rectified.
3371(a)	Treatment as employee	Being investigated.
3372	Obligations under study bond	Not justified.
3393	Treatment as employee	Not justified.
3421	Treatment as employee	Not justified.
3431	Level of salary paid	Being investigated.
3432	Payment of allowances	Withdrawn.
3444	Annulment of appointment	Rectified.
3460	Entitlement to retrospective salary increase	Withdrawn.
3475	Treatment as employee	Discontinued 14 (1).
3491	Treatment as employee	Being investigated.
3561	Interpretation of salary determination	Being investigated.
3572	Appeal against appointment	Declined 11 (1).
3506	Termination of employment	Not justified.
3610	Treatment as employee	Being investigated.
3619	Entitlement to tradesman's pay	Rectified.
3646	Termination of employment	Being investigated.
3649	Unfair treatment	Being investigated.
3685	Liability under employment bond	Being investigated.
3687	Entitlement to tradesman's pay	Being investigated.
3690	Entitlement to tradesman's pay	Being investigated.
3714	Treatment as employee	Being investigated.
3724	Obligations under employment bond	Being investigated.

OBSCURE (2)

UNSCHEDULED ORGANISATIONS (153)

<i>Complaint Registered Against:</i>	<i>Number of Complaints</i>
Court decisions	26
Municipalities	20
Private business firms	19
Private legal firms	13
County Councils	8
Private individuals	8
Reserve Bank	8
War Pensions Board	6
Education boards	4
Lottery organisers	4
Hospital boards	3
Trade unions	3
Government policy matters	3
Catchment boards	2
School boards	2
N.Z. Racing Conference	2
National Airways Corporation	2
Town and Country Planning Appeal Board	2
Private banks	2
Miscellaneous organisations, etc.	16
Total	153

Sir Guy Powles told us that he refuses jurisdiction where in his opinion the matter is one of government policy. The Act provides that where any question arises as to whether he has jurisdiction to investigate any case or class of cases an application may be made to the Supreme Court for a declaratory order determining the question.¹⁶

In addition to investigating complaints the Ombudsman suggests amendments to the law where he feels it has produced unjust, oppressive or discriminatory results.

The powers of the Ombudsman do not extend to local government affairs. In discussing this matter with us Sir Guy emphasized that the force of the sanctions he possessed lies in the sensitivity of government officials to criticism and his power to report to Parliament. In the case of local government, he said, he would only be reporting to the government he criticized, or to use his own language, "If I reported to Parliament that the City Council and so on, had done something dreadful the City Council would say 'Is that so? Well, well, well!'"

¹⁶*Ibid.*, s. 11(7). No such application has been made up to the time of our review.

CHAPTER 91

The Office of Parliamentary Commissioner for Administration in Great Britain

By an Act of Parliament passed in 1967¹ the office of Parliamentary Commissioner was established for the United Kingdom. Upon the Act coming into force Sir Edmund Compton was appointed to the office. Sir Edmund draws a distinction between the office of Parliamentary Commissioner in the United Kingdom and the office of Ombudsman in Sweden on the ground that he cannot take any punitive action. He can only investigate and report. This is true also of the Ombudsman in Denmark and the Ombudsman in New Zealand.

But there is another essential difference between the office in the United Kingdom and that of the other countries that we have discussed. The holder of the office can only act on a request coming from a member of the House of Commons, asking him to investigate a complaint duly made to that member by a member of the public. Notwithstanding that Sir Edmund is popularly referred to as the "Ombudsman" the Act describes the office as "Parliamentary Commissioner for Administration" and that is a more accurate description of the office. For convenience, we shall refer to the holder of the office as "The Parliamentary Commissioner".

¹15 Eliz. II, c. 13.

APPOINTMENT

The Parliamentary Commissioner is appointed by the Crown for life or until he attains the age of 65 years. He may be removed from office only in consequence of addresses of both Houses of Parliament.²

SCOPE OF AUTHORITY

The Act applies to those government departments and authorities listed in Schedule 2 to the Act which, for convenience, we set out in full.

“DEPARTMENTS AND AUTHORITIES SUBJECT TO INVESTIGATION

Ministry of Agriculture, Fisheries and Food.
Charity Commission.
Civil Service Commission.
Commonwealth Office.
Crown Estate Office.
Customs and Excise.
Ministry of Defence.
Department of Economic Affairs.
Department of Education and Science.
Export Credits Guarantee Department.
Foreign Office.
Ministry of Health.
Home Office.
Ministry of Housing and Local Government.
Central Office of Information.
Inland Revenue.
Ministry of Labour.
Land Commission.
Land Registry.
Lord Chancellor's Department.
Lord President of the Council's Office.
National Debt Office.
Ministry of Overseas Development.
Post Office.
Ministry of Power.
Ministry of Public Building and Works.
Public Record Office.
Public Trustee.
Department of the Registers of Scotland.

²*Ibid.*, s. 1(3).

General Register Office.
 General Register Office, Scotland.
 Registry of Friendly Societies.
 Royal Mint.
 Scottish Office.
 Scottish Record Office.
 Ministry of Social Security.
 Social Survey.
 Stationery Office.
 Ministry of Technology.
 Board of Trade.
 Ministry of Transport.
 Treasury.
 Treasury Solicitor.
 Welsh Office.

NOTES

1. The reference to the Ministry of Defence includes the Defence Council, the Admiralty Board, the Army Board and the Air Force Board.
2. The reference to the Lord President of the Council's Office does not include the Privy Council Office.
3. The reference to the Post Office is a reference to that Office in relation only to the following functions, that is to say:
 - (a) functions under the enactments relating to national savings;
 - (b) functions exercised as agent of another government department or authority listed in this Schedule;
 - (c) functions in respect of the control of public broadcasting authorities and services; or
 - (d) functions under the Wireless Telegraphy Act 1949.
4. The reference to the Registry of Friendly Societies includes the Central Office, the Office of the Assistant Registrar of Friendly Societies for Scotland and the Office of the Chief Registrar and the Industrial Assurance Commissioner.
5. The reference to the Board of Trade includes, in relation to administrative functions delegated to any body in pursuance of section 7 of the Civil Aviation Act 1949, a reference to that body.
6. The reference to the Treasury does not include the Cabinet Office, but subject to that includes the subordinate departments of the Treasury and the office of any Minister whose expenses are defrayed out of moneys provided by Parliament for the service of the Treasury.

7. The reference to the Treasury Solicitor does not include a reference to Her Majesty's Procurator General.

8. In relation to any function exercisable by a department or authority for the time being listed in this Schedule which was previously exercisable on behalf of the Crown by a department or authority not so listed, the reference to the department or authority so listed includes a reference to the other department or authority."

The act does not apply to the following:

"1. Action taken in matters certified by a Secretary of State or other Minister of the Crown to affect relations or dealings between the Government of the United Kingdom and any other Government or any international organisation of States or Governments.

2. Action taken, in any country or territory outside the United Kingdom, by or on behalf of any officer representing or acting under the authority of Her Majesty in respect of the United Kingdom, or any other officer of the Government of the United Kingdom.

3. Action taken in connection with the administration of the government of any country or territory outside the United Kingdom which forms part of Her Majesty's dominions or in which Her Majesty has jurisdiction.

4. Action taken by the Secretary of State under the Extradition Act 1870 or the Fugitive Offenders Act 1881.

5. Action taken by or with the authority of the Secretary of State for the purposes of investigating crime or of protecting the security of the State, including action so taken with respect to passports.

6. The commencement or conduct of civil or criminal proceedings before any court of law in the United Kingdom, of proceedings at any place under the Naval Discipline Act 1957, the Army Act 1955 or the Air Force Act 1955, or of proceedings before any international court or tribunal.

7. Any exercise of the prerogative of mercy or of the power of a Secretary of State to make a reference in respect of any person to the Court of Appeal, the High Court of Judiciary or the Courts-Martial Appeal Court.

8. Action taken on behalf of the Minister of Health or the Secretary of State by a Regional Hospital Board, Board of Governors of a Teaching Hospital, Hospital Management Committee or Board of Management, or by the Public Health Laboratory Service Board.

9. Action taken in matters relating to contractual or other commercial transactions, whether within the United Kingdom or elsewhere, being transactions of a government department or authority to which this Act applies or of any such authority or body as is mentioned in paragraph (a) or (b) of subsection (1) of section 6 of this Act and not being transactions for or relating to—

- (a) the acquisition of land compulsorily or in circumstances in which it could be acquired compulsorily;
- (b) the disposal as surplus of land acquired compulsorily or in such circumstances as aforesaid.

10. Action taken in respect of appointments or removals, pay, discipline, superannuation or other personnel matters, in relation to—

- (a) service in any of the armed forces of the Crown, including reserve and auxiliary and cadet forces;
- (b) service in any office or employment under the Crown or under any authority listed in Schedule 2 to this Act; or
- (c) service in any office or employment, or under any contract for services, in respect of which power to take action, or to determine or approve the action to be taken, in such matters is vested in Her Majesty, any Minister of the Crown or any such authority as aforesaid.

11. The grant of honours, awards or privileges within the gift of the Crown, including the grant of Royal Charters.”

The Commissioner may investigate any action taken by or on behalf of a government department or any other authority to which the Act applies, “being action taken in the exercise of administrative functions of that department or authority.” Where a written complaint is made to a member of the House of Commons by a member of the public “who claims to have sustained injustice in consequence of maladministration in connection with the action so taken” and the complaint is referred to the Commissioner with the consent of the person by a member of the House with a request that an investigation be conducted, the Commissioner may then act.³ It is not to be overlooked that this is a much more limited jurisdiction than that exercised by the Ombudsman of Sweden, Denmark or New Zealand.

³*Ibid.*, s. 5(1).

Jurisdiction to investigate only arises when the complaint comes through the defined channel and the jurisdiction is limited to complaints with respect to "injustice in consequence of maladministration".

The Commissioner is forbidden to conduct an investigation where a right of appeal or review exists or the person aggrieved has or had a remedy by way of legal proceedings, except where, in the opinion of the Commissioner, it is not reasonable to expect the complainant to resort or to have resorted to the legal remedies because of special circumstances.⁴ In addition, there are certain matters irrelevant for our purposes which are expressly excluded from his jurisdiction to investigate, e.g., matters of security.

A 12-month limitation period is imposed on complaints⁵ but notwithstanding this limitation the Commissioner may investigate any complaint made out of time if he thinks in special circumstances it is proper to do so.

PROCEDURE

Where the Commissioner proposes to conduct an investigation he must give the principal officer of the department concerned and any other person against whom an allegation has been made an opportunity to "comment on any allegations contained in the complaint."⁶ Other than this and the provision that the investigation must be conducted in private the Commissioner is free to adopt what procedure he deems to be appropriate.

The Commissioner has substantially the same power to procure the attendance of witnesses and administer oaths as are vested in the courts, except the power to commit for contempt.⁷ Where a person without lawful excuse obstructs the Commissioner or commits an offence which would be a contempt of court if committed in court he may be proceeded against in the High Court upon the Commissioner certifying

⁴*Ibid.*, s. 5(2).

⁵*Ibid.*, s. 6(3).

⁶*Ibid.*, s. 7(1).

⁷*Ibid.*, s. 8.

the offence to the court. In such case, the court conducts a full hearing and deals with the matter as if it were a contempt of court.⁸

POWERS OF THE COMMISSIONER

The Commissioner has no power to question the merits of discretionary decisions unless maladministration is involved.⁹ Where he decides not to conduct an investigation he must send a report to the member of Parliament who referred the complaint to him, giving his reasons for not conducting the investigation. Where he conducts an investigation he shall send the results of the investigation to the member of Parliament who sent the complaint to him and he shall also send the report of the results to the principal officer of the department or authority concerned and to any other person who is alleged to have taken or authorized the action giving rise to the complaint.¹⁰

Where it appears to the Commissioner an injustice has been caused to the complainant in consequence of maladministration and the injustice has not or will not be remedied he may lay before each House of Parliament a special report on the case.¹¹ The Commissioner is required to report annually to each House of Parliament as to the performance of his functions and make such other reports as he thinks fit.¹²

SECRECY

The provisions of the Official Secrets Act apply to the Commissioner and his staff and all information acquired is to be kept secret except as may be necessary for the purposes of the investigation and report, or a prosecution under the Official Secrets Act or proceedings for contempt.¹³

⁸*Ibid.*, s. 9.

⁹*Ibid.*, s. 12(3).

¹⁰*Ibid.*, s. 10(2).

¹¹*Ibid.*, s. 10(3).

¹²*Ibid.*, s. 10(4).

¹³*Ibid.*, s. 11.

COMPLAINTS CONSIDERED

The annual report of the Commissioner for the year ending December 31, 1967 shows that since the Act came into force on April 1st of that year, 1,069 complaints were received from members of Parliament. Of these, 849 had been dealt with by the end of the year. Of those dealt with, 561 were found to be beyond the jurisdiction of the Commissioner; 100 were dropped after partial investigation and in 188 cases the investigations were completed and reports made to the respective members of Parliament who had referred the complaints. Of those investigated elements of maladministration were found in nineteen cases only and in none did the Commissioner have any criticism of the action taken by the Department to remedy any injustice caused by the maladministration.

We have considered the Commissioner's report with respect to these nineteen cases in detail. It is quite evident that the Commissioner has given the word "maladministration" a comprehensive interpretation. The cases reported on involve unreasonable delay in making a ruling, errors in assessment of arrears in taxation matters, a lost file, delay in making refunds of income taxes and human error for which a suitable apology was a sufficient remedy. In six cases some financial adjustment was made in matters concerning taxes, custom duties and pensions.

The most important case handled by the Commissioner since he took office was the subject of a special report made on the 20th of December, 1967. It arose out of a complaint made by survivors of the Sachsenhausen concentration camp whose claim for compensation under the terms of the Anglo-German Agreement of 1964 had been rejected.

The Agreement provided one million pounds for the benefit of United Kingdom Nationals who were victims of National Socialist measures of persecution. Distribution of the money was left to the discretion of Her Majesty's government. The Commissioner criticized the Foreign Office for relying on evidence that was largely irrelevant and for the treatment of the evidence submitted by the complainants. The decision was "called in question" and the matter was left for

the Foreign Office to review its decision. The result was that compensation was paid to the complainants.

This case is much relied on to justify the office of the Commissioner but, at the same time, it emphasizes the need for statutory rights of review where discretionary powers affecting the rights of the individual of the character involved in this case are conferred on government bodies. One cannot read the report without feeling that it would have been far more satisfactory if the complainants had had a right of appeal to an independent body when their claims were rejected. In such case it would have been dealt with properly and on evidence readily available and relevant rather than on the sort of evidence that appears to have been entertained by the Foreign Office.

CHAPTER 92

Conclusions

IN coming to any conclusion as to whether an office of Ombudsman or Parliamentary Commissioner should be established for Ontario, one thing is clear and we place great emphasis on it. An Ombudsman is not a substitute for a proper legal framework which provides adequate substantive and procedural safeguards for the rights of the individual. Much that has been said and written about the Ombudsman as a protection of the rights of the individual is misleading to the public and goes far beyond any claims that are put forward for the office by those who occupy it in any country. The real safeguards of the rights of the individual lie in good legislation and good rules of procedure designed to guide and direct those who make decisions in the administrative processes of government. Rules that give a right to be heard before decisions are made affecting the rights of individuals and the right to written reasons for decisions when decisions are made, together with a right of appeal or review by a superior body having power to correct errors wherever practical, are fundamental rights for which an Ombudsman is no substitute.

It is wrong to conclude that the functions of the Ombudsman in other countries are applicable to Ontario without taking into account the philosophy of government in Ontario which is evidenced by the different procedures that have been provided for the protection of the rights of the individual. For example, as we have stated, Sir Guy Powles told us, and his reports show that a large portion of the complaints dealt with by him have reference to social security matters in which there are no rights of appeal in New Zealand.

Under the Family Benefits Act¹ those who have been refused benefits under the Act not only may have their claims reviewed by departmental officials but by a board of review which may alter the decision of the departmental officials and there is a further right of appeal to the Court of Appeal.

The procedure for review is defined and simple. This gives to the individual a much greater assurance of a proper investigation in the first instance and a greater assurance that errors will be corrected than an investigation by an Ombudsman who has no power to reverse or correct a decision.

Likewise, under the Mental Health Act,² a complete system of review boards is provided to hear complaints by patients who are involuntarily detained in psychiatric facilities (mental hospitals). The review boards have not only power to investigate but power to order the release of patients.

It is little comfort to a woman with children who feels she has been wrongfully denied welfare or a patient who feels he has been wrongfully detained in a mental institution to know that after the officials who make the decisions respecting her or his rights disagree with the Ombudsman a report may be made to the Legislature. On the other hand, it is a real satisfaction to those administering welfare and those having the responsibility of ordering the detention of patients in a hospital and to those who are charged with the responsibility of making decisions affecting the rights of others to know that if they are wrong in their decisions a review body has power to correct them.

The illustrations we have given are only examples. In Report Number 1 we published a list of statutes showing where rights of appeal are given from decisions made in different administrative processes of government.³ There are 31 statutes providing for appeals to the county and district courts or judges thereof. There are 31 statutes providing for appeals to a single judge of the Supreme Court or a local judge of the Supreme Court and 78 statutes which provide for appeals to the Court of Appeal. With very few exceptions, the decisions

¹Ont. 1966, c. 54, s. 11 as amended Ont. 1968, c. 39, s. 2.

²Ont. 1967, c. 51.

³pp. 672-77.

from which appeals are provided are from decisions made in some aspect of government outside the ordinary judicial processes of the courts.

In addition, provision is made in this Province for a very complete system of free legal aid where deserving individuals may be assisted in the exercise of their rights of appeal.⁴

In Report Number 1 we recommended that many further procedural safeguards should be provided to protect the rights of the individual in the decision-making process.⁵ Good procedure is the foundation on which good governmental administration rests. In our view that procedure should be provided by law. We recommended among other things that a Statutory Powers Procedure Act should be passed providing for certain minimum rules of procedure such as a notice of hearing, notice of the case to be met and a right of appeal to the courts or to another statutory body or to the Minister in proper cases. We also recommended a standing Statutory Powers Rules Committee with power to make detailed rules of procedure appropriate to the functions of different tribunals. These we regard as essential to good government.⁶

After a careful and exhaustive study of the functions performed by the Ombudsman in other countries we cannot find that the creation of such an office should be considered as any alternative to the implementation of the sort of recommendations we have just been discussing. To do so would be to appoint an official to investigate, recommend and report as an alternative to giving to the individual his rightful place in society with legal rights which he may assert.

That the Ombudsman is not an alternative to legal rights of review has been realized in Sweden. Professor Gellhorn, after an exhaustive study of the system there, said,

“Even among the unorganized elements of society, such as those who use free legal aid services and those who are touched by social insurance or public health administration, recourse to the Ombudsman is so rare as to be all but disregarded. Nobody among those interviewed intimated that the

⁴Ont. 1966, c. 80.

⁵Chapter 14 *supra*.

⁶This recommendation has been implemented by the introduction of Bill 130, 1969.

Ombudsman was useless, even though wholly unused by the particular group to which the speaker belonged. All agreed, in fact, that the Ombudsman is, as one man said, 'a good safety valve for the community' when no other means of securing suitable official attention may exist. They also agreed, however, that regularized methods of obtaining specialized review have been brought into being in modern times, so that the citizen with a problem is no longer helpless beneath a bureaucratic thumb, as perhaps once he was. 'In olden days,' a representative of a large economic interest declared, 'everybody needed the Ombudsman because there was no place else to turn when an official or a judge did something outrageous. The officeholders had all the power and people couldn't stand up against them. Nowadays if we have a problem, we usually have a good route to follow in order to get suitable attention. In my opinion, not very many normal people are likely to complain to the Ombudsman. As a generality, he gets the unduly combative, the hypersensitive, the offbeat types, while others look for more direct channels and then go through them.'

While this is undoubtedly an overstated opinion, it seems essentially sound. Swedes do like the idea behind the Ombudsman and are happy to have his office as a protection in reserve. But a general bureau of complaints is an inefficient means of dealing with modern government's many complexities. Sweden's sophisticated citizenry chooses to use sophisticated review procedures when they are available."⁷

Sir Guy Powles, in an address to the Canadian Bar Association⁸ put the case for an Ombudsman this way, "I would not for a moment suggest that the Ombudsman is a complete answer to all the problems of administrative justice. He is only just one tool, quite a good one, I think, but just one, and mankind needs many tools in this technological age."

Our problem is how great will the need be in Ontario for this tool if the safeguards which we have recommended in Report Number 1, and which we think are essential for the protection of the rights of the individual, are provided by law.

The solution of this problem lies in considering first our processes of government and the philosophy of democracy underlying those processes. Ministerial responsibility and access to the courts presided over by independent judges is

⁷Gellhorn, *Ombudsmen and Others*, 217.

⁸Sept. 1, 1964.

part of that philosophy.⁹ This is widely recognized in our statute law and parliamentary customs and conventions. Ministerial responsibility cannot be dissociated from the rights and duties of the elected members of the Legislature to represent the individual in matters of government as they may affect him. The member has a right to inquire, to question and in proper cases to submit questions to a Minister in the House. These are important rights and rights neither to be diminished nor circumscribed by the appointment of an officer to perform some of these duties in place of the member. Nor should the rights of review and appeal to the courts be superseded by rights to have an Ombudsman inquire, recommend and report. The question is, are all these safeguards sufficient or are there areas where they are not effective?

There are wide areas of government into which the elected member of the Legislature has no power to inquire. We refer to the administrative processes of local governments such as municipal councils and municipal bodies such as licensing boards and police commissions.

We think the case for an Ombudsman as a safeguard to the rights of the individual in the municipal field of government is much stronger than in the provincial field.¹⁰

In the municipal field the same searchlight of public scrutiny does not exist as in the provincial field of government. There is no organized opposition to the government, seeking to expose maladministration, and the theory of ministerial responsibility does not exist. We are convinced that when the procedural safeguards which we have recommended in Report Number 1 are made to apply to the decision-making process in the municipal field, the need for an Ombudsman in municipal affairs will be reduced considerably. Nevertheless, in the light of the wide areas of power exercised by local government authorities and the diverse character of the bodies exercising administrative power it would appear that an Ombudsman exercising the functions similar in nature to those exercised by the Parliamentary Commissioner in New Zealand would

⁹See Chapter 2, *supra*.

¹⁰The power of the Ombudsman extends to local government in Norway, Sweden, Finland, and is being considered in Britain. See *Bulletin of Legal Developments*, July 5, 1969.

perform a useful service in the process of municipal government.

The present geographical distribution of the powers of local government in Ontario would make it most difficult to set up an efficient system to provide the services of an Ombudsman for all municipal affairs throughout the Province and it is doubtful that a central system is desirable.

The proposed regional development of municipal government as announced by the Prime Minister on November 28, 1968¹¹ and discussed by the Minister of Municipal Affairs on December 2, 1968¹² should facilitate the establishment of the office of Ombudsman with respect to municipal government.

It may be contended that the appointment of an Ombudsman by the Provincial government with duties with respect to municipal government would be an intrusion by the Province into local government affairs. This contention is fairly answered by an examination of the origin of municipal government. Municipalities exercise legislative power delegated to them by the Provincial Legislature. It is, therefore, consistent with this delegation of power that the Legislature should provide supervision over the exercise of the legislative and administrative powers delegated. This it now does through the Department of Municipal Affairs and the Ontario Municipal Board.

We think that legislation should be enacted providing for the appointment of an Ombudsman by the Lieutenant Governor in Council for each municipal region upon the request of local governments within the region which represent over 50% of the population of the region.

We now consider whether it is necessary to provide an Ombudsman or Parliamentary Commissioner to consider complaints regarding maladministration in the government services of the Province. Considering this only as a safeguard in addition to and not in place of those recommended in Report Number 1 we are not convinced that an Ombudsman

¹¹Legislature of Ontario Debates, Nov. 28, 1968, 223 ff.

¹²*Ibid.*, 274 ff.

is one of the most urgent needs in the process of democratic government of the Province. But we do think, to paraphrase the language of Sir Guy Powles, an Ombudsman would be a useful tool. We cannot put it on any higher basis than that.

A review of the work of the Ombudsman of other countries shows that a large part of his time is taken up with complaints that have no foundation and many appear to be trivial. However, the trivial complaints are important to those who make them.

An abundance of complaints with regard to administrative matters are now received by different departments of government and particularly by the Department of the Prime Minister. There is no suggestion that these complaints are not taken seriously. From what we have learned they are carefully investigated and reports are made to the complaining parties. This system has certain advantages. When a complaint is made to the Prime Minister with respect to the administration of a department of government he is in a position to call for an explanation and this makes for efficiency in government. Likewise, when a complaint is made directly to a Minister he becomes personally aware of weaknesses in the administration if they exist. On the other hand a great amount of time must be taken up by senior officials in dealing with a multitude of complaints that on investigation have no foundation and in many cases are the creation of the imagination of the complainant.

We have come to the conclusion that it would make for more efficient government if there was some channel through which complaints with regard to the administrative processes of government could be directed. To accomplish this a bureau should be established, to be presided over by a commissioner appointed by the Legislature, with powers somewhat similar to those of the Parliamentary Commissioner of New Zealand.

If such an official is appointed it is important that definite procedural rules should be laid down. There should be no publicity with respect to complaints or an investigation unless a report is made to the Legislature. The persons against

whom the complaint is made should be promptly notified and the head of the relevant department and the Prime Minister's office should be advised of investigations undertaken.

Such a procedure cannot be permitted to be made a means of pillorying civil servants nor should investigations into matters in which any department is involved be undertaken without the knowledge of the Minister charged with the duty of administering the department.

If it is considered desirable that an office of Ombudsman should be created in Ontario we do not recommend that the holder of the office should have all the powers of the Swedish Ombudsman, including the power to prosecute government officials. Nor do we think that complaints made to him and the proceedings of the Ombudsman should be open for public inspection. The office of Ombudsman cannot be allowed to be an instrument for character assassination and public abuse of administrative officials. We do not recommend that the office should be similar to that which has been established in the United Kingdom where the members of the public cannot file their complaints directly with the Parliamentary Commissioner and where he has no power to act except on a complaint made through a member of Parliament.

Subsection 2

COMPLAINTS CONCERNING THE ADMINISTRATION OF JUSTICE

INTRODUCTION

In many countries of the world some means have been provided for the exercise of a measure of control over the courts and those presiding over them. This not only extends to the manner in which the courts are constituted and conducted but political supervision over the decision-making process.

In some countries the judges are little more than civil servants promoting the political policies and objectives of the Government. In others they are elected for a term of years which exposes them to political pressures and the taint of partisan politics. In some countries judges are subject to dismissal at the will of the head of state, while in others, as in Canada, the members of the Bench are appointed for life or until they attain a fixed age and during good behaviour. In these countries the judges have a very high degree of independence. This independence is a rich heritage to be jealously guarded against any encroachment. There is, however, an important matter of public interest in how this independence is exercised by those holding judicial office and what protection the public has against misuse of the independence the judges enjoy.

CHAPTER 93

Complaints Concerning the Operation of the Courts

WE are not concerned in this Chapter with safeguards against wrong decisions in the courts but with the interest that the public has in how the courts are conducted and how decisions are reached. The courts and the administration of justice do not come within the jurisdiction of the Ombudsman in Denmark and New Zealand or the Parliamentary Commissioner in the United Kingdom. Safeguards against errors in decisions through the rights of appeal are now provided. In Report Number 1 we discussed many procedures that required improvement and we recommended changes to improve procedures in both civil and criminal cases. If these recommendations are implemented the room for complaints concerning the administration of justice will be greatly reduced.

There still remains the wide area of how justice is administered, what safeguards are provided against delays in trials, inefficiency in the administration of the courts and in some cases, the conduct of judicial officers presiding at trials. We have in Ontario Supreme Court Judges, County and District Court Judges and Provincial Judges, all presiding in courts with far-reaching powers. The standard of appointment to the Bench in this Province has been reasonably high but under any system of appointment of judges some mistakes

will be made. When they are made there should be some means of protecting the individual against the results of mistakes that cannot be corrected by appeal procedure.

In Report Number 1 we recommended that there should be in Ontario an Advisory Judicial Council to advise the Attorney-General on the appointment of magistrates and that the Council should have authority to receive complaints concerning the conduct of magistrates in the performance of their duties and to make recommendations where warranted with respect to proceedings for removal of magistrates from office.¹

This recommendation was implemented in an Act passed during the session of the Legislature held in 1968.² This Act provided for the creation of Provincial Courts—Criminal Division and Family Division—and the appointment of judges to these courts. Under the Act the magistrates became provincial judges of the Criminal Division and the Juvenile and Family Court Judges became provincial judges of the Family Division.

A Judicial Council with jurisdiction applicable to provincial judges only was established. The Council is composed of the Chief Justice of Ontario, the Chief Justice of the High Court, the chief judge of the Provincial Courts (Criminal Division), the chief judge of the Provincial Courts (Family Division), the Treasurer of the Law Society of Upper Canada and not more than two other persons appointed by the Lieutenant Governor in Council.

The functions of the Council are:

- “(a) at the request of the Minister to consider the proposed appointment of provincial judges and make a report thereon to the Minister; and
- (b) to receive complaints respecting the misbehaviour of or neglect of duty by judges or the inability of judges to perform their duties, and to hold inquiries in respect thereof.”³

Following a report of the judicial council the Lieutenant Governor in Council may appoint one or more judges of the Supreme Court of Ontario to conduct an inquiry into the

¹See p. 544 *supra*.

²Ont. 1968, c. 103, ss. 7, 8.

³*Ibid.*, s. 8 (1)(a) (b).

behaviour of the provincial judge and only after such an inquiry he may be dismissed.⁴

The establishment of the Judicial Council provides a three-fold safeguard, a safeguard for the rights of the individual who may have a complaint with reference to the manner in which justice is administered in the provincial judges' courts and a safeguard for the rights of the provincial judges. The individual has a body which has power to entertain his complaint and at the same time a body of the highest standing is provided to consider and investigate a complaint with respect to the conduct of a provincial judge before any further proceedings may be taken to remove him. This is most important in safeguarding the integrity of the judicial process.

These provisions should provide adequate means for the redress of grievances that citizens may have arising out of the conduct of provincial judges and the manner in which justice is administered by them. There remains an important area of the administration of justice to which these provisions do not apply—that is the area coming within the jurisdiction of the Supreme Court and the county and district courts.

Provision is made under the Judges Act of Canada⁵ for the removal from office of a judge of the county and district courts by the Governor in Council "for misbehaviour, or for incapacity or inability to perform his duties properly by reason of age or infirmity, if the facts respecting the misbehaviour, incapacity or inability are first made the subject of inquiry." The inquiry must be conducted by one or more judges of the Supreme Court of Canada, the Exchequer Court or a superior court of the provinces.⁶

There are no disciplinary powers applicable to judges of the Superior Courts other than "that they hold office during good behaviour but shall be removable by the Governor General on address of the Senate and House of Commons."⁷

The Chief Justice of a superior court of a province is required to report to the Minister of Justice the absence of

⁴*Ibid.*, s. 4(2) (3).

⁵R.S.C. 1952, c. 159, s. 32.

⁶*Ibid.*, s. 33.

⁷B.N.A. Act., s. 99.

a judge of his court for more than 30 days without leave of the Governor General. Likewise, "whenever a judge of a superior or county court is absent from his judicial duties for a period in excess of thirty days, he shall report such absence and the reasons therefor to the Minister of Justice."⁸ The Act makes no provision for action by the Minister of Justice in such cases.

Where "a judge who is found by the Governor in Council, upon report of the Minister of Justice, to have become incapacitated or disabled from the due execution of his office by reason of age or infirmity [he] shall . . . cease to be paid or to receive or to be entitled to receive any further salary, if the facts respecting the incapacity or disability are first made the subject of inquiry . . .".⁹ In such cases however, an annuity may be granted.

The question remains, what provision, if any, should be made or can be made by the Province for further safeguards for the rights of the individual or to protect him from inefficient conduct of the courts or improper conduct of judges of the Supreme Court and the county and district courts?

Generally speaking, the judges of these courts and the courts over which they preside are held in very high esteem by the citizens of the Province and it is essential to the good administration of justice that this should continue to be so. Where the courts are inefficiently conducted or the conduct of a judge is open to just criticism that esteem is impaired and where it is impaired respect for all the courts and all the judges who preside over them suffers. The ordinary citizen who is the victim of or is a witness to maladministration in the courts is not inclined to attribute the maladministration to one judge but to the courts generally.

The most important aspect of the concept of the separation of powers is the independence of the judges. We are beneficiaries of the long struggle for the independence of the judges that led up to the Act of Settlement in 1700.¹⁰ It is part of the law of Ontario applying to the Supreme Court

⁸R.S.C. 1952, c. 159, s. 36.

⁹*Ibid.*, s. 31 (1).

¹⁰12 & 13, Wm. III, c. 2. See Report Number 1, p. 46, *supra*.

judges and its principles should apply to county and district court judges and the provincial judges as well. There should be no political interference with the decision-making process of the judges presiding over these courts. But the concept of the independence of the judges in the decision-making process does not extend to maladministration of justice. If the independence of the judges is to be preserved from interference from the political authorities the citizen who has a legitimate complaint about the manner in which justice is administered by the judges must have some forum in which his complaints may be heard and considered. It is not proper that the only recourse is to complain to the Attorney General or the Minister of Justice.

Two cases were brought to the attention of the Commission which emphasized the need for such a forum.

The first case occurred in a county court. The action involved a claim for the return of moneys paid for goods that were alleged to have been unsatisfactory. After repeatedly interrupting the defence counsel in the cross-examination of a witness who was an employee of the defendant but called by the plaintiff the judge stopped the case and said to defence counsel, "That is the end of the case." Whereupon the defence counsel said: "Your Honour is depriving me of putting in a defence?" To this the judge replied, "That is right. You do what you wish." Defence Counsel replied, "Very well, as long as we are clear on that, Your Honour. I submit that the defendant has a right to put in a defence." This interchange followed:

"THE COURT: He has put it in, he is for the defence (referring to the witness called by the plaintiff).

COUNSEL FOR THE DEFENCE: He is not my witness.

THE COURT: Oh, yes.

COUNSEL FOR THE DEFENCE: The plaintiff called him, Your Honour.

THE COURT: He is your employee. Judgment against the defendant in the sum of \$550.00. \$550.00, that is the amount of the deposit?

COUNSEL FOR THE DEFENCE: That is correct.

THE COURT: There will be judgment for that, you will have to pay back that, and that is all, and costs for one-half day. I don't think people should lose their time for peanuts.

COUNSEL FOR THE DEFENCE: I can say to Your Honour, with the utmost respect, it was never my intention to take up the time of the Court unnecessarily.

THE COURT: That is the impression I have.

COUNSEL FOR THE DEFENCE: I resent that very much, Your Honour."

Counsel for the plaintiff then spoke up and said: "May I say, for the purpose of the record, I submit that—I know I am making a submission on behalf of my friend, he should be permitted to go through this case and call his witnesses.

THE COURT: That is my ruling. There is no one that can budge that witness."

The result was that a very responsible counsel acting for the defendant was not permitted to fully cross-examine a witness called by the plaintiff but who was an employee of the defendant, nor was he permitted to put in any defence. Notwithstanding the protests of defence counsel and counsel for the plaintiff who realized his responsibility in the administration of justice the defendant was denied an opportunity to be heard and judgment was given against him.

No doubt such cases are rare in our administration of justice and it may be that the result was the right one in this particular case but the matter with which we are concerned and with which the public is concerned is how the result was arrived at and the impairment of the respect for the administration of justice that would probably follow.

Undoubtedly, the defendant had a right of appeal and if an appeal had been taken the costs of an appeal and the costs of the abortive trial would necessarily have had to have been borne by one or the other of the parties or both. This is unjust. Why should either of the parties have to pay the costs

of a trial that was so manifestly wrong? In this case we were advised that a settlement was arrived at. With that we are not concerned.

The other case brought to the attention of the Commission was a trial conducted by a judge of the Supreme Court of Ontario. In this case the accused was charged with criminal negligence in the operation of a motor vehicle. Counsel appearing for him complained that at the opening of the case the trial judge brought pressure to bear on him to plead guilty to a lesser charge of dangerous driving. This counsel refused to do and the trial continued. Counsel complained to this Commission that the trial judge appeared to be biased against his client throughout the trial and he felt that this influenced the jury in bringing in a verdict of guilty of dangerous driving. On appeal the conviction was set aside and a new trial directed at which the accused was acquitted. Rightly or wrongly counsel felt very strongly that his client had suffered a grave injustice because the judge had gone beyond his functions as a trial judge to try to persuade him to enter a plea of guilty on behalf of his client against the advice of counsel and on a charge on which his client was ultimately acquitted.

We are not drawing any conclusions of fact in this case other than that counsel felt he had a just grievance and no means of having it considered.

Another case was brought to the attention of the Commission where a district court judge appeared to be quite incapable of performing his full duties as a judge and, in fact, had not been performing them for several years.

The problem is: What legislative action can be taken by the Province to meet situations raised by these illustrations? Should an officer similar to an Ombudsman be appointed to receive complaints with respect to the conduct of judges of the Supreme Court and the county and district courts? In Sweden the Ombudsman performs such duties. If the facts of the two cases we have discussed were found to be as indicated with respect to Swedish judges, the Ombudsman would institute prosecutions. Such penal legislation is highly undesirable as a solution of the problem according to our concept of the

administration of justice. If an Ombudsman is appointed he should have no jurisdiction over the judiciary.

In providing for a Judicial Council to exercise some non-political supervision with respect to the provincial judges the Province has accepted the principle of giving to the citizen means by which he may have his complaints with reference to the administration of justice considered. It can be reasonably argued that similar provision should be made with respect to the Supreme Court of Ontario and the county and district courts when the need arises. There is, no doubt, some supervision of an unofficial character exercised by the Chief Justice of Ontario, the Chief Justice of the High Court and the Chief Judge of the County and District Courts but such supervision can only be of a consultative and advisory character. They have no investigatory powers.

In Denmark a Court of Complaints has been established. The Court consists of one judge of the Supreme Court, one judge from one of the two "Landsretter" which are courts immediately below the Supreme Court and one judge from the District Courts, which are courts of first instance. The "Landsretter" are courts of first instance in more important cases and courts of appeal as well. The Supreme Court is solely a court of appeal. The judges of the Court of Complaints are assigned to it for a period of ten years.

The court deals with complaints against judges and requests for the re-opening of appeals on account of extraordinary circumstances. In the case of applications for the reopening of appeals, with which we are not concerned, the judges of the Court of Complaints are joined by one university professor and one other jurist. The court has power to dismiss or reprimand a judge.

In England all the judges come under the supervision of the Lord Chancellor to some extent. They must apply to him for leave to be absent from their duties even for a short time. The powers of the Lord Chancellor, although not laid down by statute, are, no doubt, considerable and it is important to a judicial career that the judge does not earn the disfavour of the Lord Chancellor.

In Canada there may be some constitutional limitation on the power of the Province to pass a statute clothing any body with complete supervisory power over the conduct of judges appointed by the Governor General. To a certain extent that field has been entered by the federal Government with respect to county and district court judges and the special provisions of the British North America Act with respect to superior court judges.

The question remains: Can the Province provide for some means of considering complaints lodged by citizens with respect to the conduct of judges in the administration of justice and create a body with power to entertain complaints, to investigate them and to report? Without entering upon an elaborate consideration of this constitutional question we think that the matter as we state it is essentially a matter pertaining to the administration of justice in the Province and within the powers conferred on the Legislature.¹¹

There are wide areas that are not covered by the Judges Act nor section 99 of the British North America Act. These involve delays in trials, the manner of conducting trials, the disregard of the convenience of witnesses and parties, all of which reflect on the administration of justice, the respect for the courts and respect for the law. Since the Province has adopted the principle of judicial supervision over the provincial judges we think that the same principles should be adopted with respect to Supreme and county court judges.

Provision is now made for a council of judges in the Judicature Act.

"A council of the judges of the Supreme Court, of which due notice shall be given to all of them, shall assemble at least once in every year on such day as is fixed by the Chief Justice of Ontario for the purpose of considering the operation of this Act and of the rules and the working of the offices and the arrangements relative to the duties of the officers of the court, and of enquiring and examining into any defects that appear to exist in the system of procedure or the administration of justice in the Supreme Court or in any other court or by any other authority."¹²

¹¹B.N.A. Act, s. 92, para. 14.

¹²R.S.O., 1960, c. 197, s. 112(1) as amended by Bill 69, s. 1, 1968-69 2nd Session (not yet in force).

An extraordinary meeting of the council may be called by the Lieutenant Governor in Council.¹³

Under the wording of the statute the council of judges may now have power to entertain and report on complaints with respect to the administration of justice. This is not a power that it has heretofore exercised. Composed as it is of all the 37 judges of the Supreme Court it is much too unwieldy a body to exercise the supervisory power that may be required. A smaller body would function much more efficiently. In addition, the county and district court judges have no representation on the council of judges as they should have if it is to perform the duties we envisage.

A special judicial council should be created on the pattern of the Danish Court of Complaints. It should be composed of the Chief Justice of Ontario, the Chief Justice of the High Court of Justice for Ontario, the senior member of the Supreme Court of Ontario by order of his appointment to that Court, the Chief Judge of the County and District Courts and a district or county court judge designated by the Chief Judge. If for any reason it would be inappropriate for a member of the body to act or if a member of the body should be unable to act the Chief Justice of Ontario should have power to designate a judge of the Supreme Court to act for a member of that Court and the Chief Judge of the County and District Courts should have like power to designate a judge to act for a country or district court judge who is a member of the council. The council should have power to hear specific complaints which cannot be adequately and satisfactorily dealt with on appeal, concerning the manner in which justice is administered in the Supreme Court and the county and district courts and concerning any maladministration of justice in those courts. The council should report to the Lieutenant Governor in Council.

We think the power of investigation and report, together with the provisions of the Judges Act would be quite sufficient to safeguard the rights of the individual with respect to the administration of justice in the Province and the manner in

¹³R.S.O. 1960, c. 197, s. 112(3).

which courts are conducted. It is not suggested that the council should in any way impinge on the authority of the Attorney General with respect to the servants of the Province appointed to perform administrative duties in the processes of the courts.

If such a council is created proper rules should be made to safeguard the rights of any judge who may be affected by an investigation. It is essential that the proceedings should be held *in camera*.

CHAPTER 94

Costs Incurred Through Judicial Error

A SERIOUS matter arises where a judge so misconducts a trial that an appeal is allowed and a new trial directed as a matter of course. In a civil case either one or the other of the parties has to pay the costs of the appeal, the first trial and the new trial, though no fault lies with the parties or their counsel. This would have been so in the civil case we referred to in the previous Chapter if a settlement had not been arrived at.

Not infrequently in criminal cases Crown counsel admits at the opening of an appeal that he cannot ask the court to sustain the conviction because of some error on the part of the trial judge, and a new trial is directed as a matter of course. In such case the accused has been put to all the costs of the first trial and the appeal. If he can claim legal aid the costs would be paid by the government. If he cannot claim legal aid he must pay the costs himself although he has been no party to the error at the trial.

No guarantee can be given that there will not be errors made by judges in the administration of justice. Judges, no matter how highly qualified and how diligent they may be, are bound to err. In some cases there is wide difference of judicial opinion as to what the right decision should be. This is all part of the hazards of litigation but the hazards of litigation should not include maladministration on the part of the

trial judge or obvious procedural errors of an elementary character. It is not unfair that the government that provides the courts for the administration of justice should safeguard those that come before them from costs incurred by manifest error on the part of judges.

The Court of Appeal should be given a discretionary power upon the disposition of an appeal in a civil or criminal case, to direct that all costs incurred in the case should be paid in whole or in part by the government of the province where it finds that the judge has misconducted the trial or there has been obvious error. No such order should be made without due notice to the Attorney General.

Summary of Recommendations

1. The creation of the office of Parliamentary Commissioner or Ombudsman should not be considered as a substitute for a proper legal framework which provides adequate substantive and procedural safeguards for the rights of the individual.
2. A Commissioner or Ombudsman for local government with powers similar to the Parliamentary Commissioner in New Zealand should be appointed by the Lieutenant Governor in Council in each municipal region on the request of local governments within a region representing 50% of the population of a region.
3. When effective legislation has been enacted and become operative to provide the substantive and procedural safeguards for the rights of the individual recommended in Report Number 1, the situation in Ontario should be reviewed and consideration should be given in the light of experience gained to the establishment of a bureau to be presided over by a Commissioner appointed by the Legislature with powers similar to those of the Parliamentary Commissioner of New Zealand to consider complaints with regard to maladministration in provincial government affairs including alleged conflicts of interest.

4. The office if created should not be designed to diminish or circumscribe any of the duties of members of the Legislature or their rights to make inquiries and to submit questions to Ministers.
5. The rights of review and appeal to the courts should not be interfered with by the creation of such an office.
6. The holder of the office should not have any jurisdiction over the ordinary courts or the judiciary.
7. In no case should the Commissioner have the powers of the Swedish Ombudsman with regard to prosecution nor should he have power to prosecute any government officials.
8. If the office is established definite procedural rules should be laid down for the exercise of the Commissioner's powers.
9. Members of the public should have the right to file their complaints directly with the Commissioner.
10. The person against whom a complaint is made should be promptly notified and the head of the relevant government department and the Prime Minister's office should be advised of any investigation undertaken.
11. There should be no publicity with respect to complaints made to the Commissioner and neither complaints made nor proceedings before the Commissioner should be open to public inspection.
12. A special Judicial Council should be created on the pattern of the Danish Court of Complaints to receive specific complaints of citizens concerning the manner in which justice is administered in the Supreme and county and district courts and maladministration in those courts.
13. The Judicial Council should be composed as follows:
 - The Chief Justice of Ontario
 - The Chief Justice of the High Court
 - The senior member of the Supreme Court by order of his appointment to the Court

The Chief Judge of the County and District Courts

A district or county court judge designated by the Chief Judge of the County and District Courts.

14. The Judicial Council should not impinge on the authority of the Attorney General with respect to provincial servants appointed to perform administrative duties in the process of the courts.
15. Proper rules for investigations by the Judicial Council should be adopted to safeguard the rights of judges who are affected or who may be affected. No publicity should be given to the proceedings.
16. The Court of Appeal should be given a discretionary power upon notice to the Attorney General upon disposition of an appeal in a civil or criminal case to direct that all costs incurred in the case be paid in whole or in part by the provincial government where it finds that the trial judge has misconducted the trial or where there is obvious error.

Section 2

FRENCH ADMINISTRATIVE COURTS

INTRODUCTION

In Report Number 1 we stated that we would deal specifically with "the Continental system of providing safeguards against unjustified encroachment on civil rights through administrative courts such as the *Conseil d'Etat*."¹

During the public hearings held by this Commission and informal discussions with distinguished legal scholars representations were made to us that a special system of administrative courts should be established in Ontario, patterned on the model of the French system, of which the *Conseil d'Etat* forms an important part. The merits of the French system are recognized internationally and it may have features that may be capable of adoption as the processes of government in this Province become more complex.

Professor Edward McWhinney, formerly of the Faculty of Law of the University of Toronto and now of McGill University, put forward the suggestion that "an Administrative Law High Court" should be established in Ontario to be manned by judges "recruited primarily from specialists in public law whether from the practising bar or from the civil service and law schools." This scheme is quite similar to one advocated by the Inns of Court Conservative and Unionist Society and published in 1955 in a small book under the title *Rule of Law*.

A proposal, not dissimilar, was made to the Franks Committee. The suggestion was that a new division of the High Court called "the Administrative Division" be created which would have a general appellate jurisdiction over administrative decisions generally. The matter was not elaborately discussed in the report of the Committee as it was considered to be beyond its Terms of Reference.²

¹p. xviii.

²The Franks Report, 29.

We interviewed Professor W. A. Robson of the London School of Economics who had participated in the presentation of this proposal to the Franks Committee. He said that he thought it was in the proper tradition of the common law countries that there should be an Administrative Court of Appeal or an administrative branch of the Appeal Court which would consist of mixed personnel. His suggestion was that almost one-half of this body should consist of persons legally trained with the highest professional standing and a slight majority of the tribunal should consist of people of experience in public life at the ministerial level or at senior posts in the civil service, but no longer having any connection with the Government.

Professor Robson thought that the tribunal should be free to develop its own concepts of justice and determine its own procedure and work out a theory of damages. He said he had laid down these principles in the evidence he gave to the Franks Committee in the following language:

"The tribunal should have power to hear all *prima facie* cases where a public authority has acted, or is about to act, or refrains from acting, in a manner which is unduly harsh, unjust, improper or lacking in reasonable consideration to the interests of any person or persons; or where the operation of the public service has caused injury to a person or property. The Administrative Appeal Tribunal should have power to order a public authority to pay damages or compensation; to quash the decision of a public authority; to require it to cease and desist from a specified activity; or to take such positive action as the circumstances require."³

Professor C. J. Hamson of Cambridge University⁴ who has made an extensive study of the operation of the Conseil d'Etat stated to us that he was not convinced that the idea of a court with jurisdiction separate from the common law courts is desirable. He thought it more desirable to get the common law courts to do the job rather than to establish a divided system as in France. He did say however, that we would have to revise the processes of the courts very considerably.

³See Evidence before the Franks Committee, p. 493.

⁴Author of *Executive Discretion and Judicial Control*, (1954).

Professor J. D. B. Mitchell of the University of Edinburgh in an article in the 1967 *Political Quarterly* put forward the advantages of an administrative court with jurisdiction similar to the Conseil d'Etat. He said: "A new jurisdiction is required in order to free the law from the shackles on thought which are part of the heritage of the past: to free lawyers from thinking in narrow terms about administrative law, and even within those narrow terms of being captivated by the past splendours of the prerogative orders. Above all, new procedures are needed. The extreme orality of existing procedures is an obstacle, and more of an investigatory procedure is needed. New institutions help the evolution of new methods."⁵ He referred to "a sort of 'seminar' " activity in the process of judgment in the Conseil d'Etat as important, "especially when there is the necessity of hammering out a new philosophy of law." He said, "[t]hat process with us demands more than our traditional forms of advocacy and judgment can supply. This 'seminar' process must be emphasized, simply because the real problems of modern public law are incapable of solution by a nice tidy statute.

What is needed is a jurisdiction which, given an appropriate charter, can itself evolve (by a process familiar to, and accepted by, the common law in its heyday) a new and coherent system of jurisprudence."⁶

He went on to say, "[t]he court, the new jurisdiction, must be a collegiate body and should speak with a collegiate voice. Only in that way can it have the strength to match the strength of government."⁷

Professor Mitchell felt that the Court could not be organized as a Divisional Court because of the terms of the act of union between England and Scotland. In addition, he said that that would place it too low in the hierarchy. He recommended that the new jurisdiction be located in the Privy Council with judges recruited from the existing High Courts, from the civil service and from those who have not had either such experience but had studied administrative law seriously.

⁵Mitchell, *Administrative Law and Parliamentary Control*, 38 *Political Quarterly* 360, 367.

⁶*Ibid.*

⁷*Ibid.*, 368.

Within the body contemplated would be incorporated the Council on Tribunals and the Parliamentary Commissioner (Ombudsman).

*"A threefold jurisdiction should be entrusted to the new court: that already exercised over administrative tribunals, etc., through the prerogative orders in England and by equivalent procedures in Scotland; a jurisdiction within a broad definition of the term of review the legality of general administrative acts; and a jurisdiction in public contracts and in reparation for administrative fault."*⁸

The jurisdiction would cover both the central government and local governments. The Court would not be concerned with what policies were adopted but would insist that those policies be carried out with "even-handedness and honesty". The system would be decentralized.

Professors L. Neville Brown of the University of Birmingham and J. F. Garner of the University of Nottingham in their book, *French Administrative Law* after making a concise review of the French system came to this conclusion:

"The critical question remains whether the ordinary citizen fares better in his dealings with the administration in France or in England; or, to re-phrase the question more dispassionately, in which of the two countries is public administration conducted with most efficiency, yet with due regard for the rights and interests of the individual. To such questions the comparative lawyer cannot be expected to give a final answer. Nevertheless, from their English viewpoint, the authors see in the French system undoubted advantages, especially the administrative expertise of those called upon to sit in judgment upon the administration, the simplicity of the remedies, the process of written instruction permitting an intimate dialogue between court and administrator, and, most salutary of all, the depth to which the court may probe into administrative action yet without trespassing on policy or usurping the administrator's role as the ultimate arbiter on 'opportunité'. In all these respects the *droit administratif* is strong, the English law weak."⁹

Professor H. W. R. Wade of Oxford University with whom we had the privilege of a long discussion, has come to

⁸*Ibid.*, 370. Author's italics.

⁹Brown & Garner, *French Administrative Law*, 140.

an opposite conclusion to that of Professors Robson, Mitchell, Brown and Garner and the Inns of Court Conservative and Unionist Society. Professor Wade did not think that a Court in the nature of the Conseil d'Etat would fit into the English system.

In a most useful article¹⁰ Professor Wade makes a comparative study of some of the most important powers the Conseil d'Etat exercises to control the Administration, and the powers of the British judges to exercise a similar control through judicial review. He joins issue with the conclusions of Professors Brown and Garner that the French system "is inherently capable of feats of judicial control which are beyond the powers of English judges." Professor Wade contends that with the exception of one field the English courts can exercise a power of control over the administrative decision-making process that is equal to that of the Conseil d'Etat. The exception to which he refers is in the area of jurisdiction concerning contracts between the Government and the citizen. In this area he concedes that under the French system a "flexible and equitable body of rules has been devised" to do justice where the public authority has changed the rules in the "middle of the game" by making regulations or by-laws which impose additional expense on contractors. Under these rules the Court may award compensation in proper cases while the British courts cannot give relief.

The many additional procedural safeguards to protect the rights of the individual in the administrative decision-making process recommended in Report Number 1 are relevant to a discussion of how judicial control over the administrative processes of government should develop in this Province. To these we shall return after we have considered the French system—the most outstanding of the Continental systems.

¹⁰H. W. R. Wade, *Crossroads in Administrative Law*, 21 *Current Legal Problems*, 75 (1968).

CHAPTER 95

History of French Administrative Courts

AT the outset it is necessary to emphasize that in France administrative law is considered as an autonomous branch of the law and the administrative courts are autonomous courts completely separate and distinct from the ordinary judicial courts of the country.

The French administrative courts have not been planned by the State. They have developed with the expansion of government into the social and economic life of the country and the ever-growing needs of administration have determined their creation and development.

Their decisions have never rested, like decisions of the ordinary courts, on a code of general principles. The administrative law is judge made law, decisions based on experience and practice. The jurisprudence has developed and grown with all the flexibility which time and evolution require. In fact the administrative courts to a certain degree, have functioned not unlike the common law courts of England have functioned historically in developing the relevant law and the legal concepts.

These courts are an indirect consequence of the basic constitutional principle of separation of powers, laid down in 1790. This doctrine¹ was first applied between judicial power and the executive as a "safeguard" of the liberty of citizens. Montesquieu said "the power of judging must be separated from the Executive Power."

This cleavage between the judicial power and the executive was the result of long quarrels which, over the centuries,

¹See Report Number 1, pp. 52-4, 115, 118.

were carried on between the parliaments as judicial bodies² and the Royal Administration. Parliaments had a constant tendency to encroach on and supervise the Administration.

The problems to be solved were: was the Executive to be free of any kind of supervision? If not, how was the liberty of the citizens to be safeguarded against the arbitrary power of the Administration? And if the administrative power was not to be under the supervision of the ordinary courts, what control over the Administration could be exercised?

To solve these problems it was felt necessary to create some courts of an administrative character inside the Administration itself, but distinct and separate from the active civil service.

Proper appreciation of the development and functions of these courts requires a brief incursion into French history in which the French administrative courts have their roots.

Prior to the Revolution, the Conseil du Roi advised the King on legal and administrative matters. This body was not unlike the Curia Regis in early England but it did not develop as its offspring the ordinary courts of law. It functioned as a political body to settle disputes between the nobles.

The struggle to gain some control over the executive developed not within the Conseil du Roi but within the "parlements". There were twelve regional royal courts of which the most influential was the Parlement de Paris. These "parlements" not only interfered with the Executive government but claimed a monopoly in legal processes and endeavoured to prevent a subject from appealing to the Conseil du Roi for relief.

Pursuant to the Montesquieu theory of the separation of powers the power of the "parlements" was broken with the Revolution and the Conseil du Roi was abolished. In 1799 the Conseil d'Etat was established to assist the Premier Consul in drafting new laws and administrative regulations and to "resolve difficulties which might occur in the course of administration."³ It was this last function that provided the

²A parliament in this connotation was a legislative body as the term is used in British history.

³An VIII.

constitutional foundation for the Conseil d'Etat as it was to eventually develop.

By decree the Conseil was given power to advise the head of State as to the setting aside of improper administrative acts and on resolving jurisdictional disputes within the Administration and between Ministers.

The right of the citizen to appeal to the ordinary courts for the redress of a grievance against the Administration was abolished in 1790. The only recourse left was to complain to the appropriate Minister. And as we shall see later, if the citizen did not obtain redress he had a right of appeal to the Conseil d'Etat. Until 1872 the decision of the Conseil d'Etat was in theory only advice to the head of the State. The Minister was considered to be the judge in the case and the judgment of the Conseil was advice to the head of the State to correct the decision of the Minister. In practice, the advice to the head of the State was followed.⁴

It was not until 1872 that the Conseil d'Etat was given power to render a binding decision in its own name just as an ordinary court might do.⁵

With the establishment of the Conseil d'Etat as an administrative court, the Conseils de Préfecture were created in each "département" to attain separation between the active civil service and the administrative courts. It was with the creation of these courts that the protection of the individual against the arbitrary powers of the Administration began to develop.⁶

⁴This was analogous to advice now given by the Judicial Committee of the Privy Council of Great Britain to the Crown.

⁵We are indebted to Brown & Garner, the authors of *French Administrative Law*, for an outline of the early history of the Conseil d'Etat.

⁶France is divided into "Départements" (geographic districts). At the head of each "Département" is a "Préfet" who is the representative of the Government and the supreme chief of the Administration in the "Département". The "Préfet" represents the State and has the control of the police. He is appointed by decree of the President of the Republic. The Préfet is in charge of keeping public order in his "Département", enforcing the laws and carrying out national policy. He is assisted by a "sous-préfet", a cabinet chief and a general secretary and is responsible to the Minister of Interior. The "Préfets" are normally recruited from the graduates of the Ecole Nationale d'Administration (E.N.A.). This "Ecole" is divided into four sections: general administration; economic and financial administration; social administration and external affairs. Students are required to sit for competitive examinations and according to their rank they are appointed to any of the appropriate four sections.

CHAPTER 96

Composition and Functions of the Conseil d'Etat

As we shall explain later the functions of the Conseil d'Etat are now twofold—to act as an adviser to the government and to adjudicate on claims against the Administration.

The Conseil is composed of:

- (a) 44—"Auditeurs", thirty-two 1st class and twelve 2nd class recruited from those passing a competitive examination in the Ecole Nationale d'Administration;
- (b) 69—"Maîtres des requêtes" who must be of a minimum age of 30 years and have 10 years continuous service. These are chosen mostly from the "auditeurs" 1st class. Some are appointed as "Commissaires du Gouvernement". The duty of the Commissaire as we shall see later is to deliver his personal opinion at the sessions of the Conseil d'Etat sitting as an Administrative Court;
- (c) 53—"Conseillers d'Etat" who are in charge of adjudicating on cases prepared by the maîtres des requêtes or the auditeurs. Some Conseillers d'Etat are known as "Conseillers d'Etat en service ordinaire", whereas others are "Conseillers d'Etat en service extraordinaire". The latter, approximately 12, are chosen from the most qualified

persons within the various fields of national activity, e.g., mostly those who have formerly held high public office. They are not usually chosen from the civil service.

The official head of the entire body is the President of the Republic, but in practice the vice-president presides as president. On rare occasions the Minister of Justice may preside at a session.

The Conseil is divided into two sections, the administrative sections performing the advisory functions (*un organe consultatif*) and the judicial section (*Section du Contentieux*) dealing with claims. The members performing advisory functions are not the same as those who perform judicial functions. There are actually four administrative sections, i.e., the social section, the financial section, the interior section and the section of public works. The advice required from the Conseil d'Etat is normally delivered by the competent section. Whenever a question may involve several ministerial departments the relevant sections may form a Committee. On very important questions, the general assembly of the Conseil is assembled under the chairmanship of the vice-president.

In its capacity as "*organe consultatif*" it acts as a *conciliator* between those exercising the legislative powers at large, and the different ministerial departments. It keeps the balance as equal as possible between the more powerful interests of the State as such and the private interests of the citizens and it advises the government on "*projets de lois*", bills to be presented to Parliament by the different ministerial departments.

In its consultative capacity it also takes an active part in the preparation of decrees (i.e. public administrative by-laws).¹ The "*avis*" (opinion) rendered in such cases is not binding on the Government, but in practice, it is seldom that

¹Under the French Constitution in addition to powers conferred by statute the President and Ministers have certain implied powers to issue decrees and power to make rules generally corresponding to regulations in our system.

it is not followed. The Conseil may take the initiative by suggesting to the Executive reforms in the law which it believes to be desirable. Since 1963 it is required to submit an annual report reviewing the work of the year and setting out the reforms in the law which it suggests. In actual practice the various ministers now may ask members of the Conseil, either individually or in Committee, to cooperate with them in the preparation of the respective bills they propose to present to the Cabinet.

THE CONSEIL D'ETAT AS AN ADMINISTRATIVE COURT

When the Court was created in 1872 it was looked on as a court having general jurisdiction in administrative matters. Any litigation between a citizen and the public Administration was within its competency. At the same time it exercised an appellate jurisdiction to hear appeals from the decisions of the lower administrative courts, i.e., "Conseils de Préfecture". However, these Conseils de Préfecture were not courts in the general sense. They exercised a limited jurisdiction mostly conferred by special statutes. They afforded little protection to the rights of the citizens because at that time the members of these "Conseils" were active civil servants and the Courts were presided over by the Préfet himself, who had the greatest interest in obtaining a decision favourable to his administration. This did not make for the independence of the Courts. It was a situation similar to that which existed when the Ministers acted as judges in their own cause.

In the early days after its creation by Bonaparte before the Conseil d'Etat became a real court and it was as the name indicates a "Council of State" it was not obliged to follow rules of procedure. It created its own procedure in administering justice in dealing with claims of private litigants.² Slowly and because of the growth of the administrative processes it expanded its own competence by a series of decisions.

²Article 52 of the Constitution of An VIII provides "under the supervision of the Consuls, a Conseil d'Etat is in charge of solving problems which may arise in administrative matters."

For example, in *Garde Nationale de Paris*³ it declared itself competent to adjudicate in case of "excès de pouvoir". This as we shall see was a most important extension of the Court's powers. The term corresponds largely to *ultra vires* as we have used it in Report Number 1.

In 1862 some procedural rules were set out in some statutes.

In 1880 the power of the Ministers to act as judges was revoked. The decree⁴ provided "that the Conseil d'Etat is competent to hear all disputes whose settlement was formerly in the hands of Ministers." In 1889 in the *Cadot* case the Conseil cast off its practice that a complaint had to be first made to the Minister and held that it was competent to hear a case upon the direct application of the citizen.

The next important point of development was in the year 1945 when a statute was enacted specifically conferring on the Conseil d'Etat general jurisdiction with respect to claims relating to all administrative matters.

This expansion of jurisdiction brought about an enormous increase in the number of claims. The increase was due to three things: the high public regard for the Court's decisions; the development of governmental activities particularly in the social and economic fields; and the delegation of powers by Parliament to the Executive and by the Executive to public agencies. The result was that the Conseil d'Etat was soon overburdened with cases.⁵

The administrative courts were completely reorganized by a statute passed in 1953. The "Tribunaux Administratifs" which replaced the Conseils de Préfecture were given general jurisdiction as courts of first instance, except as to matters specifically reserved to the Conseil d'Etat. The "Tribunaux Administratifs" are local courts geographically located in each "Département".

The Conseil d'Etat is now a court of first instance for the limited original jurisdiction reserved to it and at the same time it is a court of appeal to hear appeals from decisions of

³décembre 28, 1832.

⁴5 Nivôse, An VIII, Art. 11.

⁵Statistics have shown that in 1950 more than 20,724 cases were undisposed of; in 1952 these amounted to 23,390; and in 1953 reached 26,000.

the "Tribunaux Administratifs" and it is a Supreme Court "Cour de Cassation" to hear appeals from decisions not coming within the jurisdiction of the "Tribunaux Administratifs", e.g., special tribunals such as a Pension Board. This function of the Conseil d'Etat as "Cour de Cassation" is not to be confused with the role of the "Cour de Cassation" which is the Supreme Court in France for the ordinary judicial structure. The Conseil d'Etat is the cour de cassation for the decisions of administrative tribunals whereas the Cour de Cassation, (The Supreme Court in Paris) has jurisdiction over the courts belonging to the ordinary judicial system.

The Conseil d'Etat as a cour de cassation may be competent to exercise its jurisdiction even when no statute grants it such powers; the recourse is open to it by virtue of the general principles of law.⁶ In the *d'Aillièrè* case⁷ a problem arose as to whether the Conseil d'Etat had jurisdiction concerning a decision made by a jury d'honneur set up after the Liberation to decide if the individual members of Parliament who had voted for the law of July 10, 1940 were eligible for office under the Fourth Republic. It was held that "Recours en Cassation" lay to the Conseil d'Etat notwithstanding that there was no express right of appeal. The court quashed the decision because no "procédure contradictoire" had been followed. In effect it was held that the decision contravened the fundamental rules of natural justice.

The first conclusion which ensues from this discussion is: the Conseil d'Etat, contrary to what is sometimes contended, is a highly empirical institution. It has been developed by experiment, not by plan. It may be rightfully said that the Conseil and other administrative courts have been accidents of history. The centralized power which prevailed in 1790 and later on, with the Consulat, Directoire and Premier Empire compelled those holding the power of Government to discharge their duties in a world which gradually became highly complex in public affairs. The Court's growth was the direct consequence of developing public necessities.

⁶*d'Aillièrè*, 7 février 1947.

⁷Conseil d'Etat, 7 février 1947.

The second conclusion is that the jurisdiction of the Conseil d'Etat and its increasing supervision and control over the Administration has been largely of its own creation. Its entire activity in this direction has been remarkably flexible and comprehensive. Through methods of its own it has gained a very high reputation in France for rendering justice. Contrary to what is sometimes contended, the opinion in France appears to be that it does not favour the Administration but, on the contrary, it is the vigilant guardian of the rights of the individual. It has not allowed itself to be controlled by a rigid system of precedents and it has attained a high degree of success in adapting itself to the constantly changing circumstances of public life.

We now consider the powers exercised by the administrative courts.

CHAPTER 97

The Judicial Powers of the Administrative Courts

IN the exercise of their judicial powers the courts are concerned with two main types of remedies. One is known as the “recours de pleine juridiction”; the other is called the “recours en annulation”.

CONTENTIEUX DES DROITS OU DE PLEINE JURIDICTION

The expression “contentieux de pleine juridiction” connotes the comprehensive powers which the administrative courts have to adjudicate on claims made by a citizen against the Administration.

Many forms of relief are open to any one who claims that he has been injured by administrative action, e.g., he may sue the public authority or the State for compensation for damage suffered in consequence of a wrongful act, or for breach of contract by the State. In such cases he brings his action in the form of a remedy of “pleine juridiction”. In practice such type of remedy is better known as “contentieux des droits”, because it has a subjective substratum. The court in its decision determines the obligations of the litigant and it may order damages to be paid or it may make a declaration and set aside the decision or it may amend it. The reasons for the decision of the court may not be based solely on the interpretation of the statute which authorized the administrative act. It may involve the construction of a contract and

in certain cases the court may be called upon to adjudicate on claims founded on tort.

This jurisdiction (*contentieux des droits, ou de pleine juridiction*) has wide application.¹

The remedy presupposes that the citizen-litigant has "a right" and the right has been violated.

The administrative judge has normally the same wide powers as any judge of any ordinary court except he has no power to issue an order directing the Administration to act in compliance with the judgment of the court. If he were permitted to do so, he would be acting as an administrator (as a civil servant).²

However, in an action for damages the judge may substitute his own decision for that of the Administration and condemn the Administration to pay damages.³

To sum up, the "*contentieux des droits ou de pleine juridiction*" is available whenever the citizen-plaintiff seeks an official recognition of his rights. The court is asked to declare that his rights have been infringed and to state what measures are necessary to redress the wrong. With regard to the State the Conseil d'Etat is in the same position as the common law courts of England which cannot issue a prerogative order against the Crown. With some exceptions this procedural difficulty applies in all types of proceedings within its jurisdiction. There is no machinery for enforcing the court's orders.⁴

¹It applies to the *contentieux* of administrative contracts (*Maurisset* 1956 Conseil d'Etat, p. 412); *contentieux* of responsibility of the Administration (*Lherbier*, 20 November 1953, Conseil d'Etat, p. 510); the changing of names (see *Revue Trimestrielle de Droit Civil* 1959, p. 10—in such cases the court can only annul the decree. It has no power to amend it: 27 April 1951, Conseil d'Etat, p. 222); the financial responsibility of civil servants in regard to the Administration (*Melot*, 4 January 1954 *Recueil des Tables du Conseil d'Etat*, p. 866); or claims for a decrease of fines (*Ste Donge et Cie*, 14 January 1950, Conseil d'Etat, p. 365); or increase of financial support (*Baillon de la Brosse*, 9 November 1960 in *Revue du Droit Public* 1961, p. 343).

²For instance, in the field of Public Works he cannot substitute himself for the Administration and order the works to be done (*Consorts Legrand*, 28 May 1935, Conseil d'Etat, p. 609), nor appoint another person as the holder of a concession (*Ste. le Centre Electrique*, 23 juillet 1937, Conseil d'Etat, p. 772), nor change the rate for a concession (*Sté La fusion des Gazs*, 14 January 1955, Conseil d'Etat, p. 25).

³Freedeman, *The Conseil d'Etat in Modern France*, 140.

⁴Brown & Garner, *French Administrative Law*, 52.

CONTENTIEUX D'ANNULATION (REMEDY FOR ANNULMENT)

This type of proceedings is, to a certain degree, the antithesis of the "Contentieux de Pleine Jurisdiction ou des Droits". The jurisdiction of the court is limited to the annulment of the act of the Administration. The sole purpose of the proceedings is to obtain an order quashing the administrative decision or act as such. It is directed against the legality of the administrative decision and not against the Administration as such.

In such a proceedings the judge cannot consider if such act or decision has been taken in breach of or violation of any contractual obligation. He has only to consider if the act or decision conforms with the public law. The citizen-plaintiff directly attacks the act as one of "la Puissance Publique" (exercise of public power).

This type of action has broad application. For example, it may be resorted to in financial matters (contentieux fiscal) for the purpose of annulling a decision for error of law, taken in income tax matters or in electoral matters (contentieux électoral) where subject to special rules laid down in the French Statute of 1884, candidates may attack the validity of municipal elections or election of the Conseil Général.⁵

Le Recours Pour Excès de Pouvoir

The most important type of proceedings before the court and the one which forms a substantial part of its judicial business is "recours pour excès de pouvoir". It is in this proceeding that the administrative courts are said to be able to control the executive in the exercise of apparent discretionary powers and to submit it to an effective and real rule of law. In this area it is claimed that the French administrative courts appear

⁵Le Conseil Général is an Assembly in which each Canton (district) is represented. There is one "conseiller" for each Canton. The main function of the Conseil Général is the management of the public properties of the "Département". It orders the main works which have to be done and determines the specifications of public works contracts. The public works of the "Département" are, for instance, the school buildings, the public buildings such as prisons or court buildings. Each year the Conseil Général has to vote on the budget, i.e., determine the expenses and revenues.

to exercise a closer control over the decision-making powers of the executive than is exercised by the Supreme Court in Ontario or the English courts.

We shall first examine the development of the action, and then discuss the grounds on which it is based, including the classes of cases that come within the action.

THE DEVELOPMENT OF THE ACTION

The grounds for "le recours pour excès de pouvoir" have developed gradually and progressively as the court extended its control over the Administration. As we have seen, the whole system was essentially an empirical one, not only insofar as the creation of courts is concerned, but also with respect to the development of the power of the court.

It was between 1800-1815 that the Conseil d'Etat assumed the right and power to annul administrative acts on the application of a citizen-plaintiff. This power of control ultimately became very broad. It extended to the incompetency of an administrative body, to the violation of "substantial powers", and to the violation of "res judicata". In other words, it extended to every grave irregularity in the decision-making process.⁶

During the French "Restauration" (1815 to 1852) the "recours pour excès de pouvoir" was subject to a particular rule: the application could be brought directly before the Conseil without first submitting it to the appropriate Minister⁷ whereas other remedies with which we shall deal later had to be submitted to Ministers, in the first instance. In addition, during this time, the remedy was expanding and becoming more defined.⁸

After the "Seconde République" gave the Conseil d'Etat a statutory jurisdiction and with the extension of the powers of public authorities during the "Second Empire" the action

⁶For incompetency see, *Dupuy-Briace*, March 28, 1807, R.L., p. 75. For violation of substantial powers see, *Habitant de Montagnard* 14-7-1811. For res judicata see, *Commune de Morbier*, 7 Thermidor An X.

⁷*Egret Thomassin*, November 18, 1818, Conseil d'Etat, II p. 424. "It is before us (Conseil d'Etat) that actions against administration in case of incompetency or 'excès de pouvoir' have to be introduced."

⁸Under the Monarchie de Juillet (1831).

for annulment developed considerably because of the policy of decentralization of government. Since the decree of November 2, 1864, it has been permissible to bring the action without the assistance of a lawyer and, in addition, the grounds on which an action can be instituted have been expanded. Some decisions of the Conseil speak of violation of the law and violation of acquired rights "détournement de pouvoir" (abuse of power) and of decisions erroneous in law.⁹

The court has laid down the principle that generally speaking where the plaintiff has more than one remedy he must choose which remedy he wishes to pursue. He cannot claim alternate remedies in the same action.¹⁰

When, by the law passed on May 24, 1872 the Conseil d'Etat was empowered to reach decisions without the pretence of advising the government, the "recours pour excès de pouvoir" was officially and legally recognized.¹¹

In 1953 the number of cases coming before the court was so great that it was decided the "recours pour excès de pouvoir" could no longer be the exclusive monopoly of the Conseil d'Etat. On January 1st, 1954, the Tribunaux Administratifs (the administrative courts of first instance) were given jurisdiction in these proceedings, with the following exceptions: actions for annulment of decrees, actions for annulment of acts which are not within the competence of an administrative tribunal, actions for the annulment of acts involving the status of civil servants who have been appointed by "decree", and proceedings to challenge administrative acts the application of which extends beyond the geographical area of any single Tribunal Administratif.

Since the "recours pour excès de pouvoir" has been the work of the Conseil d'Etat for more than a century, the legal concepts developed are so much of its own creation it follows that the Tribunaux Administratifs can now do little more than follow and apply the decisions of the Conseil d'Etat.

⁹Violation de la loi: *Bizet* (March 23, 1867, Conseil d'Etat, p. 271); Error: *Marechal* (August 8, 1805, Conseil d'Etat, p. 758).

¹⁰This is called, in French terminology, "le recours parallèle": *Mazet et Boulangers de Montluçon* (February 4, 1809, Sirey 1870 III Partie, p. 92); *Couder et Bouchers de Paris* (February 20, 1868, Conseil d'Etat, p. 193).

¹¹Art. 9.

An appeal lies in these matters from the *Tribunaux Administratifs* to the *Conseil d'Etat*.

THE GROUNDS FOR THE ACTION

The grounds on which the court may act in proceedings for "*excès de pouvoir*" are:

Incompetence: — *ratione materiae*
 — *ratione loci*
 — *ratione temporis*

Vice de forme

Violation de la loi

Détournement de pouvoir

Violation des principes généraux du droit.

Clear classification of cases is not possible. A case may involve any of these grounds and as will appear from our later discussion the grounds may tend to merge. The act of the Administration may be complex. It may involve a violation of the law and at the same time an illegality because of the underlying reasons or motives for the decision.

On the other hand, the classification we have made has certain practical value. For instance, in practice, it is well known that if the ground is illegality, the court will first examine the external ground of illegality before it examines the internal one. This allows the court to annul an act for non-compliance with form without being required to consider the substance of the act. However, this would not prevent the court from adjudicating on the substance if grounds based on substance appear to be of sufficient importance whether there is external illegality or not. Such a system is sound because if the nullity is granted only for defect of form and not for the substance of the powers exercised, the Administration could act anew in correct form, while acting within its powers.

Since the "*recours pour excès de pouvoir*" is based on illegality the remedy is considered as being in its very nature of "public order" (*ordre public*). This is not synonymous with the English term, public policy, because it involves a

broader concept. The practical and technical point of this is the administrative judge may raise on his own initiative a ground of "ordre public" even if it has not been raised by the parties, and notwithstanding that it is not within a prescribed limitation period. In other words the judge in raising the plea of "ordre public" considers that it is a matter that should be settled notwithstanding the normal rules of procedure.

The following grounds are considered as pleas based on "ordre public" in the practice of the court: the incompetency of the civil servant to act; the lack of previous consultation with the Conseil d'Etat where required; the fact that an administrative body had not given notice before making a decision, and the fact that the act complained of has been carried out without the authorization of law.¹² In practice these different pleas are set forth by the "Commissaire du Gouvernement", whose duties we shall discuss later, when he delivers his opinion on the case before the court. This "Commissaire du Gouvernement" (not as might be supposed the government advocate) impartially considers the issues beforehand and reaches his own personal conclusion as to what should be done in both law and justice and makes his submissions to the court. He may be considered to a certain degree the "conscience of the court".

Incompétence (Incompetency)

"Incompétence" may be defined as a "vice" (defect) which taints any act or decision whenever the administrative authority has acted beyond its powers. The grounds for incompetency may be based on the provisions of the statute law or on the "general principles of law."

"Incompétence" exists but not exclusively whenever:

- 1) the public authority which purported to act has no power to act;

¹²For instance a decision made concerning civil servants who were no longer in office and to whom the statute in question could not apply: *Mesmer* (23 May 1947, Conseil d'Etat, p. 218); *Weber* (26 Nov. 1952, Conseil d'Etat, Recueil Tables, p. 786). Taxes levied not authorized by the fiscal law: *Trassard* (23 January, 1957, Conseil d'Etat, p. 50).

- 2) the public authority has acted beyond the limits of its power as a public authority;
- 3) the public authority has encroached on the power of the Parliament, or the ordinary judicial power;
- 4) a civil servant of an inferior rank makes a decision which is only and exclusively within the power of his superior.

Since the rules concerning "compétence" are considered as being of "public order" it follows that:

they cannot be modified by agreement (contract);¹³ they can be raised by the judge even if the citizen-plaintiff did not do so;¹⁴ emergency is no excuse, as a matter of principle;¹⁵ and no authority can confer its competence on a subordinate unless there is a legal power of delegation.¹⁶

The "incompétence may be one of "ratione materiae", or "ratione loci", or "ratione temporis".

Incompétence Ratione Materiae

This ground gives rise to most claims. It involves incompetency as to the subject matter.

There are certain fields which are definitely outside the competency of any administrative authority. For instance, an administrative body cannot encroach on the field of Parliament, e.g., an administrative act cannot create a new offence nor a new sanction, nor a new court. The creation of courts belongs to the exclusive authority of Parliament; so also the creation of a public body.¹⁷ An administrative authority cannot create a monopoly¹⁸ nor determine the rules concerning the responsibility of the State¹⁹ nor put restrictions on fundamental public liberties²⁰ nor make retroactive decisions.²¹

¹³Gras, January 11, 1935; Dalloz Hebdomadaire 1935, 186.

¹⁴Adler, October 18, 1950, Conseil d'Etat, p. 761.

¹⁵Extreme emergency may be an excuse: Chong Wa, January 23, 1953, Conseil d'Etat, p. 34; Viguiet, June 26, 1946, Conseil d'Etat, p. 179.

¹⁶Wagner, November 2, 1939, Conseil d'Etat, p. 547.

¹⁷Etablissement public Barret, 13 December 1957, Conseil d'Etat, p. 675.

¹⁸Société des Grandes Huileries Perrusson et des Fontaines 16 Nov. 1956, Conseil d'Etat, p. 441.

¹⁹Distillerie de Magnac Laval, 2 May 1958, Conseil d'Etat, p. 246.

²⁰Belkacem Bentami, 18 June 1926, Conseil d'Etat, p. 614.

²¹Garrigue, 16 May 1956, Dalloz 1956, 252.

All these restrictions on the power of the Administration were gradually created by judicial decisions of the Conseil d'Etat.

Since the Constitution of 1958 was adopted, the jurisdiction of Parliament has been defined by Article 34. It reads:

"All laws shall be passed by Parliament. Laws shall establish the regulations concerning:

- civil rights and the fundamental guarantees granted to the citizens for the exercise of their public liberties; the obligations imposed by the national defense upon the persons and property of citizens;
- nationality, status and legal capacity of persons, marriage contracts, inheritance and gifts;
- determination of crimes and misdemeanors as well as the penalties imposed therefor; criminal procedure; amnesty; the creation of new juridical systems and the status of magistrates;
- the basis, the rate and the methods of collecting taxes of all types; the issuance of currency.

Laws shall likewise determine the regulations concerning:

- the electoral system of the Parliamentary assemblies and the local assemblies;
- the establishment of categories of public institutions;
- the fundamental guarantees granted to civil and military personnel employed by the State;
- the nationalization of enterprises and the transfer of the property of enterprises from the public to the private sector.

Laws shall determine the fundamental principles of:

- the general organization of national defense;
- the free administration of local communities, the extent of their jurisdiction and their resources;
- education;
- property rights, civil and commercial obligations;
- legislation pertaining to employment, unions and social security.

The financial laws shall determine the financial resources and obligations of the State under the conditions and with the reservations to be provided for by an organic law.

Laws pertaining to national planning shall determine the objectives of the economic and social action of the State.

The provisions of the present article may be developed in detail and amplified by an organic law."

The result is that the power of Parliament to legislate is no longer absolute. It is strictly restricted to those matters coming within Article 34. On the other hand, under Article 37 the Executive has been given legislative power in all fields not coming within Article 34. It reads:

“Matters other than those that fall within the domain of law shall be of a regulatory character. Legislative texts concerning these matters may be modified by decrees issued after consultation with the Council of State. Those legislative texts which may be passed after the present Constitution has become operative shall be modified by decree, only if the Constitutional Council has stated that they have a regulatory character as defined in the preceding paragraph.”

It follows that the provisions of the 1958 Constitution have widened the powers of the Administration and accordingly increased the scope of the authority of the Conseil d'Etat. The Government now may not only enact regulations (decrets) in all matters which are not specifically included within the limited jurisdiction of Parliament, but the executive has found loopholes in the broad language of Article 34, permitting it to legislate in those fields that are apparently reserved to Parliament.

It is the function of the “Conseil Constitutionnel” to advise the government on all matters with reference to the Constitution and accordingly it will give its opinion as to whether a matter falls within Article 34 or Article 37.

Incompétence Ratione Loci

This type of incompetency involves what we might call territorial incompetency. Actions based on it are very rare. This is due to the fact that each civil servant knows the limits of his territorial or local power. For instance, it is inconceivable that a mayor of a specific city would make administrative orders for another city.

Incompétence Ratione Temporis

“Incompétence ratione temporis” covers the case where an administrative act is done outside the time allowed for doing it. It usually arises where appointments are made in anticipation. The principle being that no civil servant has an

unlimited power as to time, he cannot issue an administrative order in anticipation. For example, he cannot appoint a person to an office which has not been vacated,²² nor can members of a Cabinet which has been overturned make effective decisions other than those which are urgent and for the "current affairs."²³

Vice de Forme (Defect in form)

The problem of non-compliance with the formal requirements for the exercise of administrative powers may not appear to be important because the nullity of such acts would appear to be the automatic consequence of the irregularity. It is simple to prove and it does not seem to require serious juridical discussion.

In spite of this, the question of form is important. On the one hand, if an irregularity or non-compliance with required formality automatically carries with it the nullity of the administrative act, the Administration will be encouraged to be too formal; on the other hand, if it may not carry with it nullity of the act the Administration may be inclined to lower its formal standards.

Since formalism is considered to be a means of protecting the rights of the individual against the arbitrary exercise of power by the Administration the Conseil d'Etat has adopted a compromise. It has drawn a distinction between those formalities considered to be "substantial" and those which are not. This power is an important one to consider in relation to the recommendations made in Report Number 1 with respect to the discretionary powers that should be conferred on the Supreme Court of Ontario with respect to judicial review, i.e., power to refuse to quash a decision where no substantial wrong or injustice has been caused to the applicant.²⁴

²²*Association des Bibliothécaires Français*, June 20 1930; Dolloz 1932, 2^e Partie, p. 25.

²³*Syndicat Régional des Quotidiens d'Algérie*, 1952. *Revue de Droit Public*. In this case it was held that an outgoing Ministry, in spite of the fact that it technically remained in office was only entitled to transact "des affaires courantes" during the period after the declaration in Parliament of its decision to resign and before the formal take-over by its successor.

²⁴See p. 315, *supra*.

What is a Substantial Formality?

Considered *per se* the non-compliance with a formality is an "excès de pouvoir" whatever may be the form of the rule of law (statute, general principle of law or "règlement administratif") which imposed it. In spite of this if the rights of the citizen-plaintiff have not been prejudiced the judge is permitted to exercise a limited discretion where the lack of compliance with the legal formality is in the nature of a clerical error. It may be said there must be a causal connection between the formality and the determining "motif" for the formality (its purpose).²⁵

In very exceptional circumstances the defect of form that would otherwise be substantial may be disregarded where the particular facts of the case warrant it. On this matter the Conseil d'Etat has developed a definite policy. Exceptional circumstances are determined from *de facto* situations. In such circumstances the authority of the ordinary rules in regard to public administration are suspended and the court lays down rules applicable to the particular circumstances. War may be considered as an exceptional circumstance.²⁶ Political tension after the Liberation in 1944 was considered an exceptional circumstance.²⁷

²⁵The following were not considered to be substantial breaches of formality: an enquête (examination of witnesses) lasted 2 days instead of 3, but the parties involved in the case had not objected on the ground that they had been prevented from properly presenting their cases, (*Taburet*, January 22, 1937, Conseil d'Etat, p. 95); irregular constitution of a "bureau de votation" (polling booth) without any effect on the final results, (*Election au Conseil locale de l'établissement de Pondichery*, 16 Nov. 1938, Conseil d'Etat, p. 848); witnesses who did not take the oath—their deposition having been disregarded, (*Buillon*, 31.1.1951, Conseil d'Etat, p. 53); insufficiency of the number of assistants in a Committee, (*Syndic de défense des Chartrons*, May 27, 1927, Conseil d'Etat, p. 627). On the other hand, where an extradition was ordered without the previous advice of the "Chambre des mises en accusation", it was held that there was a substantial breach of formality, (*Petalas*, Nov. 18, 1955, p. 548) and a licence may not be revoked by the Administration without the licensee having a hearing, (*Veuve Trompier-Gravier*, May 5, 1944; *Dalloz*, 1945, III).

²⁶*Heyriès*, June 28, 1918 dans les Grands Arrêts de la Jurisprudence Administrative, p. 128. This was the case of a decree which suspended the security of civil servants to permit their transfer or discharge in the interests of national security.

²⁷*Dame de la Murette*, March 27, 1952 (Tribunal des Conflits) in les Grands Arrêts de la Jurisprudence, p. 358.

Such situations give rise to two main consequences. On the one hand, the administrative authority is exempted from compliance with legal rules which would frustrate or hamper its action, rules of form, rules of procedure, and substantive rules and rules affecting fundamental liberties. On the other hand, the Administration is bound to submit itself to the “*légalité de la crise*” (legality of the state of crisis) as defined by the judge. This means that the Administration has to carry out the purpose for which a state has been judicially acknowledged to exist and it has to adjust the situation to comply with the proper and adequate means to achieve the “*légalité*”. The judge controls the acts of the Administration in the interests of the State. This general principle is not to be considered as an exception to the superior principle of legality. On this point the French authors generally agree with the court. They contend that the survival of the State is the essential and fundamental basis of legality. The stability of the State would be impaired if, under these exceptional circumstances, the ordinary and normal course of Administration had to be strictly followed. Even in normal circumstances, the strict rules of legality in the administrative field may be discarded occasionally.

Violation de la loi (Breach of Law)

This expression seems to be clear but nevertheless it requires some discussion. Firstly, what is the “*loi*”? Secondly, what is violation?

The French concept of “law” includes any act emanating from Parliament and promulgated by the President “*de la République*” and “*decrets-lois*” (decrees) and those types of administrative acts which are known as “*règlements*” (e.g. by-laws) passed in the exercise of a delegated power. “Law” includes International Treaties and International Agreements because according to the French concept (contrary to that of Canada) international treaties and agreements are considered as a part of the internal (domestic) law, provided the treaty or agreement has been ratified by the French Parliament and published according to Article 55 of the Constitution. The

judge may in consequence annul an administrative decision made in violation of a treaty.²⁸ It is the duty of the judge to satisfy himself that a treaty has been ratified.²⁹

No court in France has jurisdiction to consider alleged violations of the Constitution itself.³⁰ Hence, if an administrative decision appears to be contrary to the Constitution, no court (whether administrative or judicial) has been given power to question its constitutional validity. However, the Conseil d'Etat has held that it has power to give effect to the "déclaration des droits de l'homme", as defined by the Declaration of 1789 and reaffirmed in the preamble of the Constitution of 1958. The court has declared that the Declaration belonged to the field of "general principles of law" and not constitutional law.³¹

What May be a Violation of the Law?

Many illustrations may be drawn from practice. A systematic delay in the application of the law may be considered a violation of the law. The government may have a certain latitude in delaying action but if the postponement is indefinite, it is illegal.³²

Imposing conditions on citizens who wish to get a permission or exercise a definite right (i.e. licensing)³³ is a violation of the law, and so is a refusal by the administrative authority to exercise its powers.³⁴

In general, the most important grounds of "violation of law" is the wrong interpretation of the law.³⁵

²⁸*Dame Kirkwood*, May 30, 1952, in *Revue de Droit Public*, p. 781.

²⁹*Villa*, Nov. 16, 1956, Conseil d'Etat, p. 433.

³⁰For reference to the "Conseil Constitutionnel" see p. 1433 *supra*.

³¹*Condamine*, June 7, 1957 in *Revue de Droit Public*, 1958, p. 98.

³²A judicial decision was delivered concerning the sale of wine. The Administration delayed in giving effect to it. This decision had in fact a considerable importance because it had a value similar to that of a legal trademark (appellation d'origine). The delay by the Administration was considered as illegal: *Syndicat de Défense des Grands Vins de la Côte d'Or*, July 24, 1936; Dalloz 1937, 3^e Partie, p. 41.

³³*Société Anonyme des Sucreries et Distilleries de Françières*, Sept. 19, 1945, Conseil d'Etat, p. 353.

³⁴*Boney*, June 16, 1944, Conseil d'Etat, p. 171.

³⁵*Société des Chaussures André*, June 18, 1947, Dalloz 1947, p. 356; *Préfet de Police*, May 9, 1952, Conseil d'Etat, p. 236.

Le Détournement de Pouvoir (The wrongful exercise of Power)

This ground for nullity is a most important one to consider when comparing the powers of the Conseil d'Etat with the powers of judicial review exercised by our courts when reviewing the exercise of discretionary administrative powers. The famous case of *Barel*³⁶ affords a good example of the control the Conseil d'Etat has over the exercise of ministerial discretionary powers.

To become a civil servant of a higher grade, it is necessary in France to pass through the Ecole Nationale d'Administration. Candidates must pass a competitive examination and they must give notice of their intention to compete so as to be included in a list of candidates. All the preliminaries must be settled by the Président du Conseil des Ministres and not by the Minister of Education, because the Ecole Nationale is inter-departmental. But, the president may delegate his power, and in fact, in this case, he delegated his power to the Secretary of State to settle the list. Five candidates were not notified that they had not been included in the list. They appealed to the Conseil d'Etat. The Secretary of State contended that he had acted in this matter in pursuance of the discretionary power he had. The appellants based their case on two grounds. First, they had been excluded for political reasons because they had connection with the communist party. Such a decision—they contended—was contrary to the right of every citizen to hold what lawful political opinion he pleases. Secondly, they claimed that, while their dossier had been taken into consideration the contents of the dossier had not been made known to them. Their right to reply had been denied.

The Minister refused to furnish reasons for his decision to the Conseil d'Etat in response to a demand made by it. In giving its decision the Court held that the Minister was under a duty in spite of a highly discretionary power, which the Court recognized, to give reasons and that the reasons given should be the same as those on which he based his decision.

³⁶*Barel*, 29 May 1954, Conseil d'Etat.

Since he did not give reasons the Court assumed that there were no facts to support his decision. There was a wrongful exercise of power and no fair hearing. The decision was quashed.³⁷

“Le détournement de pouvoir” as a ground for annulment rests on the principle that the Administration must exercise its powers within the main purposes of the law. Every act of the Administration is directly connected with a special and limited purpose. If the exercise of the power or the discretion of the Administration is not directed to the attainment of that very purpose, then the decision must be quashed. In other words, in spite of the fact that the public authority may have respected the external legal requirements for the exercise of its power if it has made use of its power outside its intended scope the authority has not acted within the very purposes of the law.

In considering “le détournement de pouvoir” the Court is concerned with something more than the formal or external legality of the act. The legality which is the substance of this ground is an internal one. This “vice” may affect any type of administrative act, either “règlementaire” (general regulation) or a decision affecting a specific person or legal entity.

The Administration May Not Have Acted for the Protection of the Public Interest

In this sense it is said that the Administration has no “arbitrary” power. For example: the order of a mayor giving authority to hold a public ball provided a certain person (a political enemy) did not act as treasurer of the organizing committee was annulled.³⁸

³⁷In this case, the Section du Contentieux which was in charge of conducting the inquiry, exercised the power of the Conseil d'Etat to draw from the competent Administration all documents which might assist the judge in forming his opinion including those supporting the allegation of the plaintiff. It ordered the Secretary of State to produce the dossier. No satisfaction was given to the Section; the contention of the plaintiff was considered as proven.

³⁸Géraud, 19 January 1910, Conseil d'Etat, p. 23.

The Administration May Have Used Its Power in the Interest of a Third Person or of a Certain Class of Persons

In one case, an administrative order was annulled which directed the opening of a rural road. The apparent purpose was to have better access to the main road, whereas in fact, the real purpose of the order was to favor two members of the municipal corporation.³⁹ In another case, an order was annulled which directed that electric current be cut off during an aviation meeting so as to save the body organizing the meeting from having to pay for the use of electric current.⁴⁰

The Administrative Act May Have Been Done for Improper Political Purposes

Examples under this head are: dismissal of a civil servant who had been elected mayor of a municipality from the service to prevent him from acting in his capacity as a mayor at the same time⁴¹ and, refusal of a subsidy to a private technical school on religious grounds.⁴²

The Administration May Have Acted in Another Public Interest than the One in Which it was Empowered to Act

As an illustration, if broad police powers have been conferred on the mayor and préfet to maintain public order or public health, neither the mayor nor préfet may use his powers for any other purpose, however legitimate such a purpose may be.

In the case of *Beaugé*⁴³ the mayor had enacted a municipal by-law which prohibited people from undressing on the beach. Cabins were available to rent from the municipality for that purpose. The by-law had not been enacted for public decency "motifs", but in the financial interests of the municipality.

³⁹*Ruhle*, 2 February 1928, Conseil d'Etat, p. 127.

⁴⁰*Société Forces Motrice du Vercors*, June 26, 1931, Conseil d'Etat, p. 692.

⁴¹*Georgin*, 27 April 1928, Conseil d'Etat, p. 536.

⁴²*Oeuvres de St. Nicolas*, 7 June 1950, Conseil d'Etat, p. 422.

⁴³4 July 1929, Conseil d'Etat, p. 641.

Wrong Purposes

"Détournement de pouvoir" will apply where the Administration has acted for a purpose other than that provided by statute; for instance, to avoid some rules of "compétence" or some embarrassing requirements. Examples: withdrawal by the prefect of a credit in the budget of a township for a reason not relevant to the financial interests of the township;⁴⁴ abolition of a certain office disguised under pretence of re-organization of a service;⁴⁵ sanitary works ordered for a public interest other than sanitation.⁴⁶

Under this heading, "le détournement de pouvoir" is resorted to by the Conseil d'Etat as a ground for nullity only when no other ground is available.

"Violation des principes généraux du droit".

The Conseil d'Etat will declare powers exercised to be in violation of the law if they infringe the general principles of the law (principes généraux du droit). In this context we use the word "law" as meaning "droit" and not in its narrow sense "loi" as meaning written or statutory law as discussed earlier. Hence there may be violation of the law even where there is no breach of any written text. This doctrine followed by the Conseil d'Etat is considered to be the pith and substance of French administrative law. Professor Rivero has said: "The entire French public life is submitted to ethical rules of which the component ingredients have been determined outside any written text."⁴⁷ This has been underlined by a Commissaire of the government:⁴⁸

"In the margin of written laws there exists broad principles whose recognition as rules of law is necessary to perfect the juridical structure within which the Nation has to live, considering the political and economical institutions which

⁴⁴*Ville de Castelnaudary*, 19 February 1921, Dalloz Hébdomadaire, 1931, p. 196.

⁴⁵*Soulmagnon*, 19 June 1946, Conseil d'Etat, p. 410.

⁴⁶*Latour*, 9 July 1948, Dalloz 1949, Sommaire, p. 50.

⁴⁷Rivero "Le juge administratif un juge qui gouverne?" In Dalloz 1951, Chronique No. 21. "Le juge soumet l'ensemble de la vie publique française à une éthique dont il définit les éléments en dehors de tout texte écrit."

⁴⁸*Société des Concerts du Conservatoire*, 9 March 1951, Conseil d'Etat, 1951.

are its own, and whose violation carries with it the same consequence as the violation of the written law, i.e., not only nullity of the act taken in complete ignorance of their existence, but also the recognition of a fault on part of the authority which had the duty of doing this very act."

The most striking feature of the evolution of this new concept lies in this fact: before 1944, the Conseil d'Etat did not use the expression "principes généraux" while at the same time it compelled the Administration to submit itself to these principles without saying it. It is only since 1944 that resort has been officially and openly had to these general principles.⁴⁹

⁴⁹*Maillou*, 22 May 1946, Conseil d'Etat, Tables, p. 470.

CHAPTER 98

General Principles Applied By The Court In The Exercise Of Its Jurisdiction

NO RETROACTIVE EFFECT OF ACTS OF ADMINISTRATION

ACTS of the Administration can have no retroactive effect. This policy is justified by the imperative necessity of ensuring order in the juridical relationship between the Administration and the citizens.¹ But certain exceptions are recognized, e.g., where a "statute" expressly authorizes the Administration to act retroactively. In such case the court is obliged to give effect to the statute.² Also retroactive effect will be given to an order where it is only of a declaratory nature³ or where it confirms an act formerly done to redress a grievance.⁴

VIOLATION OF FUNDAMENTAL LIBERTIES

A group of cases based on general principles of law are related to the "Déclaration des Droits de 1789", which was reaffirmed in the preambles to the Constitutions of 1946 and 1958. This group of cases refers to the principle that equality

¹*Arnaud*, 11 August 1918, Conseil d'Etat, p. 837; *Ducommun*, 20 July, 1951, Conseil d'Etat, p. 422.

²*Guillou*, 31 January 1951, Conseil d'Etat, p. 53.

³*Bossis*, 15 February 1956, *Revue Pratique de Droit Administratif* (R.P.D.A.), p. 54.

⁴*Martin*, 9 June 1961.

must prevail among the citizens,⁵ e.g., in public services,⁶ in income tax⁷ and in relation to the public financial burden. However the Courts have recognized as lawful some infringement on the liberty of commerce and industry.⁸

Some questions have been raised recently with regard to the new provisions of the Constitution of 1958. As we have seen, in the new constitution the powers of Parliament were enumerated and other matters and subjects were reserved to the government and taken out of the normal competency of parliament by virtue of Article 37. The question arose as to whether these subjects could be submitted to the control of the Conseil d'Etat, in case government decrees infringed the general principles of law.

The Conseil declared that in the exercise of its autonomous "pouvoir réglementaire", the Executive must observe the general principles of law.⁹ This decision is an important one because in effect under the French system it gives to the general principles of law a sort of "constitutional value". This raises the question, does this policy infringe on the French principle that courts cannot pass on the constitutionality of laws? It is generally admitted that it does not. The theory is that general principles of law are to be observed by the Government when it uses its "réglementaire" power under Article 37. Hence the general principles of law prevail over any rule emanating from the Government. In laying down such a principle, the Conseil d'Etat has succeeded in carrying on the same policy as that which previously prevailed prior to the Constitution of 1958.

VIOLATION OF "RES JUDICATA" **(REFUSAL TO GIVE EFFECT TO A DECISION)**

As we have seen, the Court has no machinery to enforce its decisions but nevertheless violation of "res judicata" by

⁵*Darmon et autres*, 21 January 1944, Conseil d'Etat, p. 22.

⁶*Société des Concerts du Conservatoire*, 9 March 1951, Conseil d'Etat, 1951.

⁷*Guicysse*, 4 February 1944, Conseil d'Etat, p. 45.

⁸*Syndicat des Propriétaires de Forêts de Chêne-liège d'Algérie*, 7 February 1948, Conseil d'Etat, p. 74.

⁹*Syndicat Général des Ingenieurs Conseils*, 26 June 1959, Conseil d'Etat, p. 396. See also: *De Laboulaye*, 29 October 1960, Conseil d'Etat, p. 570; *Société Industrielle Commerciale d'Approvisionnement*, 12 February 1960, Conseil d'Etat, p. 103.

refusing to comply with a decision of the Court comes under the control of the Conseil d'Etat. The doctrine of "res judicata" to some extent makes the decision of the Court effective since the refusal of the Administration to give effect to decisions of the Court is considered a violation of the law, unless the execution infringes on public security.¹⁰

SUPERVISION AND CONTROL OF THE "MOTIFS" (REASONS) FOR ADMINISTRATIVE ACTS

The position taken by the Conseil in the area of "motifs" has given it control over the substantive law and the motives which should normally attach to the acts or actions of the Administration.

Illegality may arise out of the reasons for the administrative acts. Illegality (except as to form) based on grounds of nullity other than "motifs" automatically carries with it nullity of the act but illegality based on "motifs", does not necessarily have the same strict effect. In these cases the Court has a wide discretionary power.

Even though no reasons are required, and in spite of the fact that the decision is of a highly discretionary character, the Conseil d'Etat may annul it whenever in its opinion the reasons were mistaken in fact or erroneous in law. The Court controls not only the "motifs de droit" but the "motifs de fait". This involves consideration of both law and fact and whether the decision can be supported when the law is properly applied to the facts and also matters which may be classed as mixed law and fact.

Motifs de Droit (Reasons of Law)

The Conseil d'Etat has developed a policy concerning cases in which there is neither violation of the statutory law, nor of forms, but where the reasons of the Administration

¹⁰*Couitéas*, November 30, 1923, Conseil d'Etat, p. 789. In practice many "Préfets" are reluctant to enforce judicial decisions concerning the eviction of tenants of houses or apartments. If the prefect enacts a decree ordering the bailiff not to execute such a decision, the Conseil d'Etat may annul it, (*Union de la Propriété Bâtie de France*, December 29, 1944; Sirey 1947, III Part, p. 5).

had "no legal basis" (*manque de base légale*); the reasons given were insufficient or wrong. "*Manque de base légale*" arises where the "*motif de droit*" which is the basis of the act is impugned because it may never have existed, does not yet exist or it may have existed but has ceased to exist. In other words, the act is deprived of any "legal" basis. It has no juridical value. Examples—a decision made while ignoring that a "pardon" had been already granted, the pardon having completely changed the field for the application of the law;¹¹ a decision made concerning a civil servant when he was no longer a civil servant;¹² annulment of a prefectoral decree which condemned a contractor to pay damages to a public corporation for breach of a contract which had never been entered into;¹³ an order of the military authorities directing the lessee of premises to vacate them in order that they might be occupied by the military was annulled because the military authorities had no legal power to make the order; the premature enforcement of the law by the Administration where no "*règlement*" had been previously enacted for its enforcement lacks any legal basis (legal basis does not yet exist); a decree of expropriation in case of emergency enacted for national defence purposes was annulled because expropriation for national defence purposes was no longer authorized after June 1st, 1946.¹⁴ In this context illegal may mean a decision which rests on a regulation which has been previously annulled by the Conseil d'Etat.¹⁵

Error may exist where the Administration has applied the right law but has given to it a scope which it did not have. In such a case the Administration has been guilty of an "*excès de pouvoir*" by ignoring the meaning and the extent of the law. Examples—nationalization of workshops which were working for non-military purposes while nationalization was only authorized for workshops which were work-

¹¹*Chabert*, May 20, 1955, Conseil d'Etat, p. 270.

¹²*Poussier*, April 20, 1949, Conseil d'Etat, p. 189.

¹³*Société Bougrand et Dupin* 1942, Conseil d'Etat, p. 335.

¹⁴*Société Sucrière de l'usine Sainte Marthe*, May 22, 1953, in *Recueil Arrêts*, Conseil d'Etat, Tables, p. 500.

¹⁵*Bouland*, 18 July 1947, Conseil d'Etat, p. 327.

ing for military purposes;¹⁶ refusal by the Minister of Agriculture to sponsor a private rural school on the ground that the law forbade any official sponsorship of a school of a religious character whereas there was no such restriction in the statute.¹⁷

Motifs de Fait (Reasons of Fact)

This type of ground for nullity has become the most important one. At the beginning of the 20th Century there were some isolated decisions on this point but there was no definite concept for its application. There was confusion between the “motifs” (reasons) as a criterion, and the purpose of the administrative decision.¹⁸

This confusion was cleared up in 1922 in the case of *Arrêt Trépont*.¹⁹ A ministerial decree was issued to vacate a particular prefect's office but in his reasons the Minister stated that the office had been vacated at the request of the prefect whereas such request had not been made. The decree of vacation was annulled notwithstanding that there had been other causes justifying the vacation. Since this case the Conseil d'Etat has continually kept control over the “motifs” of the acts and this policy has become a cardinal one.

A subsidiary rule has been developed which is said to have become in the practice of the Court the “daily bread” of nullity. The rule is this: the Administration is not permitted to use its discretionary powers under the cloak of false reasons. It must exercise intellectual honesty. This supervision is extensive. It extends not only to the materiality of the facts but permits the Court to examine the juridical interpretation given to the facts by the Administration.

¹⁶*Société des Etablissements Edgar Brandt*, March 10, 1939, Conseil d'Etat, p. 155.

¹⁷*Syndicat d'Enseignement Agronomique et de Recherches Agricoles*, 22 March, 1941, Conseil d'Etat, p. 46.

¹⁸*Benedictins de Poitiers*, January 23, 1906, Conseil d'Etat, p. 178.

¹⁹January 20, 1922 in *Revue de Droit Public*, 1922, p. 82.

EXACTITUDE DE LA MATERIALITE DES FAITS (MATERIAL CORRECTNESS OF THE FACTS)

A fact may be a determining one or a non-determining one in the opinion of the Court. In the latter case no order of annulment will be made.²⁰ On the other hand, an Administrative act will be illegal if it is based on a fact that is materially wrong.²¹

In deciding on the "exactitude" of a fact the Court may have to look into the external circumstances which led to the administrative decision. The fact which gave rise to the administrative decision may have been materially correct but there had been performance under duress, e.g., "Epuration" concerning civil servants in Alsace. It was proved that these servants had been forced against their will to adhere to the National Socialist party.²²

The evidence of incorrectness of a fact may be found in the "dossier" (administrative file) or shown from external circumstances. In the matter of evidence, the Conseil d'Etat does not consider itself bound to follow the principle *actori incumbit onus probandi*. It relies on all the evidence including all the facts and documents found in the inquiry conducted by the section of the Contentieux.²³

It is to be noted here that the Conseil d'Etat takes a very positive attitude in matters of evidence. In *Ministre des Anciens Combattants*,²⁴ the Conseil emphasized that in spite of the fact there was no certain proof it could act on proper inferences.

APPRECIATION OF THE JURIDICAL "QUALIFICATION" AS APPLIED BY THE ADMINISTRATIVE AUTHORITY

The judge is in the same position as a judge of the ordinary courts when he has to decide if the facts support a legal

²⁰*Société Chaigneau-Ancelin*, July 11, 1945, in *Droit Social*, p. 154.

²¹*Terracher*, June 28, 1945, *Sirey Illème Partie* p. 49. The appointment of a chancellor of a University was made to replace a chancellor thought to be appointed to another office whereas he had not been appointed to that office.

²²*Kobler*, October 31, 1950, *Conseil d'Etat*, p. 523.

²³*Masson*, 28 February 1948, *Conseil d'Etat*, p. 38.

²⁴*c. Delaporte*, 4 December 1959, *Conseil d'Etat*, p. 655.

proposition. For example, the difficulty that arises sometimes in deciding whether a contract is a contract of sale, or a contract of lease and hire is a familiar one in other branches of the law. The judge in administrative law encounters the same difficulties. He must decide if a fact on which the Administration based its decision is of such a nature as to legally justify the decision. Was the act correctly "juridically qualified"?

The foundation for this type of supervision and control by the Conseil d'Etat was at the first justified by saying that the Court was the "Superior" in the administrative hierarchy.²⁵ But it would appear that the actual basis for the jurisdiction rests in the fact that in some cases facts may belong to a certain definite juridical category so that the appreciation of the juridical "qualification" made first by the Administration falls within the control of the judge.²⁶ Examples—a person claims an indemnity for having been wounded during the war. Is such a wound to be "qualified" as a "war wound"?²⁷ Privileges are reserved for those syndical associations that are the most representative. If the Administration finds that an association is not most representative the Court must consider if the decision was founded on the proper appreciation of the facts.²⁸

POLICY DECISIONS

As a matter of principle the judge cannot consider the policy of the decision of the Administration. If he did he would be substituting himself for the Administration. When the judge sets aside a decision of the Administration he must do so because it is illegal, but never because the decision is "inopportune".

This is subject to one exception, where the Court may control policy. It has supervision over the control of the

²⁵*Marc et Chambre Syndicale de Propriétés Immobilières de la Ville de Paris*, 3 June 1908, Sirey 1909, III Partie, p. 113.

²⁶See M. Waline, *Droit Administratif*, Paris 1959, No. 724.

²⁷*Gransee*, 3 January 1936, Conseil d'Etat, p. 6.

²⁸*Syndicat des Cadres de l'Assurance*, 6 June 1947, Conseil d'Etat, p. 252; *Fédération des Travailleurs du Sous-Sol*, 4 February 1949, Conseil d'Etat, p. 57 and *Berthier*, 28 July 1952, p. 431.

"administrative police".²⁹ The court considers as "legal" only the measures necessary to maintain public order. This cannot be justified on a juridical basis. It is justified on the ground that the court has always considered that the administrative police authorities are inclined to abuse their power under pressure of local circumstances, and perhaps also because the area is one of the most sensitive areas touching civil liberties.

The classic case is that of *Benjamin*.³⁰ In this case the mayor of Nevers had prohibited a public meeting because he feared there would be trouble in the city. The Conseil d'Etat took into consideration all the circumstances and came to the conclusion that the fear of trouble alleged by the mayor was not as great as he thought it was and that he should have taken the necessary measures to maintain order without interfering with the exercise of the right to meet.

SUPERVISION OF DELEGATION OF AUTHORITY

The power to delegate is considered to be strictly personal and cannot be assigned. Delegations are never presumed and they are literally interpreted. They may be granted verbally, provided their existence is established by proper proof.³¹

Some rules have been established for an effective delegation.

Firstly, conditions are attached to the "acte" which confers delegation. Delegation must be foreseen and expressly authorized. The delegation may be authorized by "loi" (statute) or by decree. The Conseil d'Etat recognizes delegation by decree³² unless the delegation is purely and "strictly a personal one"; in such case a "loi" (statute) must provide for it.³³

Secondly, a valid delegation must be one exercised only by the authority which has been legally empowered to dele-

²⁹The administrative police are those engaged in regulating traffic, controlling demonstrations and keeping order generally. These are to be distinguished from the "Police Judiciaire" who are engaged in the enforcement of the criminal law and are under the control of the ordinary courts.

³⁰19 May 1933, Sirey 1939, IIIème Partie, p. 1.

³¹*Société Sabarot*, January 11, 1948, Conseil d'Etat, p. 260.

³²*Mogambury*, December 2, 1892; Dalloz, 1893, III^e Partie, p. 1.

³³*Société La Grande Brasserie la Nouvelle Gallia*, June 17, 1938, Conseil d'Etat, p. 541.

gate.³⁴ The delegation must be in strict conformity with the act authorizing delegation.³⁵

Finally, certain requisites are imposed with regard to the acts which may be performed by the delegatee. The latter may only act insofar as the delegation has been officially publicized³⁶ and the delegation has not been revoked or its object has not expired.³⁷

The non-compliance with these requirements nullifies the delegation.³⁸

³⁴*Syndicat des Industriels Laitiers d'Ille et Vilaine*, July 26, 1950, Conseil d'Etat, p. 462. Power may be delegated by a mayor to his assistants, (*Barthés* 2-2-1934, Conseil d'Etat, p. 162) or a préfet to one of his subordinates, or a minister to a subordinate to sign departmental (cabinet) documents.

³⁵*Gayral*, July 25, 1934, Conseil d'Etat, p. 901.

³⁶*Société Bordeaux Export*, December 2, 1959, Conseil d'Etat, p. 641.

³⁷For instance, when the delegator is no longer in office: *Descours*, January 10, 1951, Conseil d'Etat, p. 12.

³⁸*Dame Veuve Perrot*, May 16, 1928, Conseil d'Etat, p. 187.

CHAPTER 99

Procedure

THE general rules concerning procedure before the "Tribunaux Administratifs" and the Conseil d'Etat were laid down in the ordonnance of July 31, 1945.¹ In general, the procedure is designed to be simple and relatively cheap.

LA DECISION PREALABLE (PRELIMINARY DECISION)

Before an action may be commenced the plaintiff must first request the Administration to answer his complaint and it is only when the Administration refuses to answer or fails to give satisfaction or gives only partial satisfaction that the plaintiff may institute the action.

The origin of this rule has been the subject of some controversy. Some have contended² that it was a necessary logical rule. It has been argued that it is logical that the action in the Court can only be permitted when the Administration has dismissed the request of the plaintiff for relief. As long as there is no dismissal, there is no conflict.³ Others have justified the rule on the ground that it was laid down by the Court out of respect for those engaged in the Administration. The action is not considered to be an action against a member of

¹(Art. 40-84), in the Decree of July 31, 1945 (Art. 36-42) and in the Statute of June 7, 1956 and August 4, 1956 (Art. 39-48).

²E. Laferrière, *Traité de la Juridiction Administrative*.

³Hauriou, *Traité de Droit Administratif*.

the public administration as such but it is directed against the act done. The criticism is an "impersonal" one.

In any case the "décision préalable" provides an opportunity for conciliation. It is in the nature of a preventive measure to avoid litigation.

When the plaintiff has referred his complaint directly to the Administration concerned, the Administration may remain silent but silence does not deprive the complainant of his right to proceed. A time limit is imposed by statute within which the Administration must reply. With certain exceptions the time limit is four months.⁴ Upon the expiration of the time limit the claim is deemed to have been rejected.

If the Administration seeks to rely on the limitation period within which an action must be commenced and contends that it has dealt with the claim within the time limit by a dismissal or by admitting it in part or entirely, it must produce the decision and proof that it has been served on the person concerned.

Only those answers to a claim which emanate from the competent public administration are to be considered as valid answers.⁵

Strictly speaking the plaintiff is not permitted to bring his case before the Court before the expiration of a four months period. In practice however, the Conseil d'Etat permits an action to be brought earlier, provided the four months period expires while the suit is pending.⁶ In the view of the Court, it would be unreasonable to dismiss an action as premature, if at the time when the judge is called upon to adjudicate, the time limit had elapsed.

The party aggrieved must bring his action within two months from the date of service of notification of the *décision préalable* dismissing the claim whether the dismissal is express or implied.⁷ The time runs from the day after the service and

⁴Decree, November 2, 1864 (Art. 7); July 17, 1900 (Art. 33) for Conseil d'Etat; Decree September 30, 1953 (for Administrative Tribunals) and Statute, June 7, 1956.

⁵For instance a personal letter from a prefect is not to be considered as "une décision préalable" emanating from the "Département" (*Département de la Mayenne*, June 30, 1905, Conseil d'Etat, p. 576).

⁶*Jouanne*, November 26, 1924, Conseil d'Etat, p. 931.

⁷June 7, 1956, Statute, No. 56, 557.

no extension of time is permitted, except the running of the time may be interrupted if a request for legal aid has been made⁸ or when the action is brought before the wrong court.

"CAPACITE" (INTEREST TO INSTITUTE THE ACTION)

As a general principle the "capacité" to institute an action is that required for any action before an ordinary judicial court. Minors (under 21 years old) must be represented by their legal representatives; a married woman if not conventionally separated as to property must have the previous authorization of her husband. Any action on behalf of a bankrupt is instituted by the assignee in bankruptcy; legal heirs may institute an action in the name of the deceased; foreigners are required—according to Article 166 and 167 of the Civil Code of Procedure—to give security for the costs and damages which might be imposed on them. If the action relates to legal entities, i.e., "associations de fait", "sociétés de fait" (partnerships), unions and others the action must be instituted by their legal or conventional representatives.

Insofar as public legal entities are concerned, the action must be instituted on behalf of the State by the Minister whose decision is involved, by the Préfet for the "Département", or by their legal representatives for public establishments.

THE MATERIAL REQUIRED

In order to guard against frivolous proceedings⁹ the material must include a copy of the decision in question, a summary of the facts, arguments on law, and the names and addresses of the parties concerned.¹⁰

In those cases where a party is required to be represented by a lawyer the application must be signed by an "avocat"; otherwise it must be signed by the plaintiff or his legal representative.

⁸*Demoiselle Pierre*, March 4, 1949, Conseil d'Etat, p. 112.

⁹*Vasnier*, June 1, 1953, Conseil d'Etat, p. 254.

¹⁰Art. 40, Order of July 31, 1945.

When the application is lodged with the Court the parties are bound by the contentions as set out in it. The entire application becomes "immutable"¹¹ and it must be based on the same claim as that originally put forward to the Administration.

INTERLOCUTORY MEASURES

Interim Suspension of the Decision

As a general rule, the action does not prevent the administrative decision from being effective pending the hearing. In administrative law this is a most important prerogative of the Administration. If such a rule had not been adopted the mere commencement of an action would have a paralyzing effect on the Administration.

In exceptional cases however, when the execution of the decision under attack would create considerable prejudice or hardship, the Conseil d'Etat may order the suspension (*sursis*) of its execution until the final judgment is issued.¹² Tribunaux Administratifs may not exercise this power in matters concerning public order and security.¹³ Although the power to grant a "*sursis*" was legally recognized in the decree of July 21, 1945, Article 48, the Court has been most reluctant to exercise it.

Emergency Orders

In case of emergency the ordinary courts have a special procedure which empowers the President of the tribunal, without considering the "substantive law" to order that urgent measures be taken to safeguard the interests of the parties. This procedure is called "*référé*".¹⁴ This power is much more

¹¹*Société Intercopie*, February 20, 1953, Conseil d'Etat, p. 88. In this case the plaintiff took as a basis of his action the fact that the composition of the National Committee for workmen's accidents was irregular. In reply he argued that the decision issued by that Committee was in violation of the law. This was disallowed.

¹²For instance grave prejudice to a social private association: *Mouvement Social Français des Croix de Feu*, November 27, 1936, Recueil Arrêts, Conseil d'Etat, p. 1039.

¹³*Préfet du Var*, June 15, 1954, Conseil d'Etat, p. 398.

¹⁴Statute, November 28, 1955 (Art. 24, Statute of July 22, 1889).

limited in the administrative courts. The motion must be brought directly before the Court and under certain definite conditions. It will only be considered insofar as the main relief sought is within the normal jurisdiction of the courts. The motion must be made by an "avocat" if the main action must be instituted by an "avocat".¹⁵

The emergency measures taken must promote the final disposition of the case.¹⁶

EVIDENCE

As a general principle the laws of evidence are not the same in proceedings before the "tribunaux administratifs" as those before the Conseil d'Etat. The rules of evidence now followed by the "tribunaux administratifs" are determined with precision by the Statute of July 22, 1889. On the contrary, there are no restrictions on the evidence before the Conseil d'Etat. The judge has the right to require from any of the litigants what evidence he wishes. In spite of the fact that the rule *actori incumbit onus probandi* generally prevails, the judge may shift the burden of proof to the other party.

THE RAPPORTEUR

The "rapporteur" may be any senior or junior judge of the sections concerned designated by the president of the section to prepare a report for the Court. In practice his report is divided into three parts. The first part sets out the relief sought, the arguments of the parties including the law relied on by both the plaintiff and the defendant. The second part sets out what may be called the order that the "rapporteur" proposes should be made. The third part deals with the questions of fact and law, the opposing arguments presented and the solutions proposed by the "rapporteur" together with the reasons which have led him to prefer the order which he proposes.

¹⁵*Saporta*, October 12, 1956, Conseil d'Etat, p. 366.

¹⁶*Pieton Guibout*, July 13, 1956, Conseil d'Etat, p. 440.

The whole "dossier" is examined by the president of the Court and it then comes before the judges of a subsection of the Court for discussion. After the subsection has prepared an analysis of the case and the "Commissaire" has prepared his opinion and notified the parties of the view he intends to put forward and develop, the case is set down for judgment.

THE COMMISSAIRE DU GOUVERNEMENT

The "Commissaire" is charged with the duty of making a presentation to the Court, in oral form, in which he completely reviews the law and the facts as they appear from the "dossier" and submits his opinion ("conclusion"). The "Commissaire du Gouvernement" is not to be compared with the "Ministère Public" (Attorney-General) of an ordinary court. The latter may receive written orders from the Minister of Justice, whereas the "Commissaire du Gouvernement" is professionally independent in delivering his opinion. He is said to be an independent representative of the "Droit" not favouring the Administration.¹⁷ This officer has great influence in the formation of the "doctrine", i.e., principles of the Law. But the judgment of the Court does not necessarily follow the "Commissaire's" views of the case as submitted by him. The Court is independent. Sometimes the report of the case will mention the name of the "Commissaire" and refer to the fact that the judgment issued is contrary to the "conclusions" of the "Commissaire". In spite of the fact that his "conclusions" are developed orally, they are always previously prepared in writing and usually published in collections of administrative reports, (*Recueil du Conseil d'Etat*).

THE JUDGMENT

When the "rapporteur" has read his report in open court and the "Commissaire" has reviewed the facts of the case and stated his opinion on the relevant law and proposed a solution with his reasons therefor, the "délibéré" follows.

¹⁷*Gervaise*, July 10, 1957, *Dalloz*, 1957 *Sommaire*, p. 15.

Two sub-sections may take part in it, one of which must be the sub-section before which the case is heard or a full section or the "Assemblée plénière" may be assembled according to the complexity of the case.¹⁸ The délibéré is in secret and the judgment is usually very succinct. It may annul the administrative act and sometimes it may issue an "injonction" against the Administration.

The real problem that follows is to know what obligations are imposed on the Administration by judgment issued.

Where the judgment dismisses the action, the problem is what is its effect? Normally it has only a relative authority. A second action may be instituted if the parties (plaintiff or defendant) are not the same ones as in the case decided, or if the "cause" is a different one. If the dismissal is based on "motifs de fond" (substantive law) a new action may be brought by the same plaintiff provided it is based on a different "cause". However, where an administrative act is annulled for "excès de pouvoir" it is deemed never to have existed.¹⁹ It follows that to a certain degree in spite of the non-retroactivity of administrative acts that the judicial decision of annulment may have a retroactive effect. The annulment, of itself, necessarily carries with it some retroactive results since administrative acts when annulled are deemed never to have had legal effect.

As a matter of principle, the decision compels the Administration to restore the situation to that which prevailed before the administrative act. But this rule is sometimes difficult to enforce. If we suppose that nullity rests on a "motif" of external illegality, nothing prevents the Administration from complying with the rules of competency or form whose violation led to the judgment, and makes a valid decision.²⁰

As a matter of principle a judgment should not affect third persons but, in fact, it may do so. In consequence the judge may make some "individual" orders to avoid this result,

¹⁸Brown & Garner, *French Administrative Law*, 48.

¹⁹Rodière, December 26, 1925, Conseil d'Etat, 1065.

²⁰Hurlaux, February 16, 1940, Conseil d'Etat, p. 65; Duboucher, February 18, 1955, Conseil d'Etat, p. 446.

e.g., reinstatement of a civil servant illegally dismissed.²¹ The career of the aggrieved person has to be fully restored.²²

In general the execution of the judgment of the Court rests on the real and effective co-operation of the Administration. The experience has been that, in general, the Administration does not refuse to co-operate but sometimes co-operation may be too long delayed. If the execution of the order is delayed beyond what might be called a "reasonable delay" the Administration may be condemned to pay damages on the ground that the Administration committed a "fault" (*faute de service*).²³ In some cases the judge may, in his judgment, fix a specific time within which the Administration should execute the decision.²⁴

COUNSEL

Since the reforms of 1953, the policy has been that the procedure before the "tribunaux administratifs" exercising general jurisdiction of first instance should be simple and inexpensive. With certain exceptions it is not necessary to be represented by a lawyer in cases coming before these courts.

On the other hand there is a body of Counsel called "Avocats au Conseil d'Etat" who practice before the Conseil d'Etat. The number is limited to sixty. These lawyers also practice before the Supreme Court (Cour de Cassation). They are called "officiers ministériels". They purchase their office (*achat de la charge*) from the State. Since 1948, women have been permitted to become "Avocats au Conseil d'Etat". All "avocats" perform the duties of both solicitors and barristers as we know those duties. They prepare the written submissions and eventually present verbal argument before the Court, when necessary.

In many cases the plaintiff is allowed to present his own case, or to have a representative duly authorized to do so. But it is compulsory to be represented by an "avocat" in cases

²¹*Viron Réville*, May 27, 1949, *Gazette du Palais*, 1949, 2^e Partie, p. 34.

²²The judge may take into consideration the chances of a "promotion" (*Guillot*, January 4, 1960, p. 4).

²³*Soubiron-Poney*, July 29, 1953, *Conseil d'Etat*, Tables, p. 717.

²⁴*L'homme*, May 12, 1950, *Conseil d'Etat*, p. 284.

involving pecuniary compensation, and in cases concerning “nullities” in the matter of elections.

Legal aid “assistance judiciaire” may be granted to any litigant either before the Tribunaux Administratifs, or before the Conseil d’Etat.²⁵

The Bureau of legal aid comprises two representatives of the Minister of Finance, three members of the Conseil d’Etat, and “avocats” (or honorary “avocats”) appointed by the General Assembly of the Conseil, and two “avocats” appointed by the “Ordre des Avocats”.

Legal aid is granted if poverty is established and the claim is a “serious” one. If granted, the litigant is exempt from all costs and counsel is appointed ex-officio. No appeal lies from a refusal of legal aid.²⁶ There is no special office to administer legal aid for the Tribunaux Administratifs. The request is brought before the office of the ordinary courts for the judicial legal aid, where the plaintiff is resident and is transmitted to the appropriate Tribunal Administratif.

SPECIAL CHARACTERISTIC FEATURES OF PROCEDURE BEFORE THE CONSEIL D’ETAT

Several characteristic features of the procedure should be stressed.

First of all the traditional characteristic is that it is *inquisitorial*. This is contrary to the “accusatoire” procedure before an ordinary civil court where the parties and not the judge have the initiative in the preparation of the case. Here the Court has complete initiative.

In the administrative Court the president of the subsection which will deal with the case takes the lead in the procedure. He may order the litigants to serve each other with their “mémoires ampliatifs”, i.e., their complete submissions on fact and law, within a specific time. In such case the Court issues an “ordonnance” (order) called “soit communiqué”. Such an order may fix the time within which it must be carried out. Non-compliance may result in an adverse

²⁵The Statute of January 22, 1851, as amended July 10, 1901, and December 4, 1907.

²⁶*Paya Monzo*, March 29, 1957, Conseil d’Etat, p. 225.

decision.²⁷ The Court has power to order an "enquête" (the hearing of witnesses) or an "expertise" (a written report made by specialists). The judge is the master of the procedure and it may be that contrary to the rule *actori incumbit onus probandi*, he may compel the Administration to produce the evidence thus relieving the plaintiff from doing so.²⁸

The second characteristic of the procedure is that it is *contradictory*. Each litigant presents his case and has a right of reply.

Neither party may communicate anything to the Court which is not open for discussion and reply by the other. After the parties have exchanged their documents and written arguments, they may, through counsel, put their contentions and develop their arguments verbally before the Court.

The third distinctive feature is that the procedure is basically a written one. In fact, the whole case must be developed in writing. The parties are only allowed to make short "observations orales", i.e., verbal comments on their written submissions, and, only insofar as they arise out of the written text.²⁹ Developing some new argument is not permitted except those based on public order ("ordre public").³⁰

It is generally said that the proceedings are conducted in secret but this requires some clarification. Documents produced are available only to the parties and to the Court. They are not available to the public. The case is not conducted in public. Only the parties are present. However, the opinions of the "Commissaire du Gouvernement" submitted to the Court are made public.

²⁷*Fauveau*, Nov. 12, 1930, Conseil d'Etat, p. 928; *Veuve Perret*, January 10, 1940, Conseil d'Etat, p. 7; *Sté Financière de Lyon*, July 1, 1949, Conseil d'Etat, p. 323.

²⁸*Barel*, May 18, 1954, Conseil d'Etat, p. 308.

²⁹*Société Industrielle des Produits Chimiques, Bozet Malettra*, February 11, 1953, Conseil d'Etat, p. 62.

³⁰*Sté Française de Transports Gondrand Frères*, 11 May 1956, Conseil d'Etat, p. 202.

CHAPTER 100

Conclusions and Recommendations

BEFORE a recommendation is made that this Province enter upon such a far-reaching and wide-spread change in our judicial and administrative processes of government as would be involved in establishing administrative courts modelled on the French system we must be convinced that the changes would make for better government and that the rights of the individual would be better safeguarded than they are now or would be if the relative recommendations contained in Report Number 1 are adopted.

We have considered carefully all the submissions made to this Commission and we have made an exhaustive study of the French system. Our conclusion is that the people of Ontario would not be better served by the adoption of such a system.

From a study of the earlier Chapters of this Section it is clear that the French system of control of the decision-making process in the exercise of statutory powers is a very complex one and not as simple and expeditious as some of its advocates suggest. In the first place, before the Court can act to correct a wrong there is a delay of up to four months in order that the Administration may have an opportunity of answering the complaint. Under our system a motion to quash a decision made in the exercise of a statutory power may be brought as soon as the decision is made on seven days' notice, which time may be abridged in urgent cases. No involved investiga-

tion by the Court prior to bringing the matter before the judge is required. Seldom is it necessary to examine witnesses and the production of documents is, in most cases, forthcoming with little difficulty. Usually the issue is simple. Did the tribunal have power to act or did it misconduct itself by denying the applicant rights well established by law?

It is contended that one of the commendable features of the French system is that cases are disposed of promptly. None of the writers whom we have consulted bear this out. The *Tribunaux Administratifs* take on the average 18 months to dispose of a case.¹ That is the decision in the first instance. An appeal from the decision of the *Tribunaux Administratifs* to the *Conseil d'Etat* will take some additional time. Professor Hamson has said the main criticism made in France is based upon the slowness of justice—the delays are truly shocking.²

Since applications of the nature we are considering are made in this Province summarily with a minimum of formalities, there are no procedural barriers to having the first hearing of a case completed within a fortnight. If the parties act promptly, an appeal from the decision in first instance may be set down for hearing within a month or at the most two months. An appeal to the Supreme Court of Canada would necessarily take some time but few of these cases go to the Supreme Court of Canada.

To set up another system of courts in Ontario to deal with judicial review of the exercise of statutory powers would in one respect be to retrace the steps taken in legal history in this Province. It would create two systems of courts with jurisdictional disputes between them, reminiscent of jurisdictional disputes between the common law courts and the courts of equity prior to the passing of the *Judicature Act*. In France the problems of competing jurisdiction require the services of a special court—the *Tribunal des Conflits* to settle conflicting jurisdictional claims. This Court is composed of ten judges, five drawn from the *Conseil d'Etat* and five from the ordinary courts.³

¹Brown & Garner, *French Administrative Law*, 136.

²See Hamson, *Executive Discretion and Judicial Control*, 137.

³Brown & Garner, *French Administrative Law*, 72.

It has been urged that the French system affords to the individual an opportunity to have his claim redressed by a simple, inexpensive process through which the individual may present his claim in many cases without a lawyer. It is true that when an action is commenced in the court the machinery for its preparation for hearing is largely provided by the State. In Ontario we have a very comprehensive system of legal aid provided for persons who are certified as qualifying for it. We gravely doubt that the public would be better served by providing for claimants a permanent legal service for the conduct of cases of the nature we are discussing.

The chief argument put forward in favor of the French system is that it provides a judicial structure that works with a better understanding of the processes of government and the judges by reason of their training have special expertise in these processes. It is contended that our judges tend to be too legalistic and rigid in their decisions with respect to judicial review and do not show an awareness of the problems of government.

This criticism is only fair in isolated cases. There is no doubt that the procedure with regard to judicial review requires considerable improvement. This we recommended in Report Number 1. It may well be that judicial decisions which enforce the rules of natural justice and require statutory rules to be followed may appear to limit freedom of action in the exercise of statutory powers. But that is an elementary safeguard for the rights of the individual. He is entitled to a decision according to law and not according to the caprice of the individual person making the decision. The surest safeguard against arbitrary action before any tribunal is a sound legal procedure. No submissions were made to this Commission showing that the courts were open to criticism for placing unfair or unjust restrictions on the exercise of statutory powers. While on the other hand, we received many representations advocating the strengthening of the procedures of the tribunals to provide further safeguards for the rights of the individual.

In Report Number 1 we recommended that applications for judicial review should be heard by at least three judges

and that these judges should be selected by the Chief Justice of the High Court to permit some specialization in administrative law. We think if this is done any ground for criticism for lack of expertise would be significantly reduced.

There is another area that is largely overlooked by those who advocate the adoption of the French system for Ontario. We have in this Province a very different form of government than that of France. As we have pointed out, the legislative power that is not assigned to Parliament by the Constitution of France rests with the Executive. The result is that in France there are vast powers that may be exercised by decree. On the other hand in Ontario, subject to the power of disallowance, the Legislature is sovereign when exercising the powers conferred on it under the British North America Act. The only legislative power which the Executive may exercise is that conferred on it by the Legislature. We find it difficult to see how a judicial system that has been a product of 200 years of growth in another country with systems of government that have undergone several constitutional changes could be engrafted onto our system which is so distinctly different.

We have left to the last what we regard as an insuperable barrier to the adoption in Ontario of anything that would be more than a mere fragmentation of the French system. The barrier is a constitutional one. The Province could create an Administrative Court to exercise powers similar to those exercised by the Conseil d'Etat but only the federal Government could appoint judges to preside over the Court. The provincial Government could not confer on judges appointed by the Province wide powers of judicial review since such powers would be analogous to those exercised by Superior and County Court Judges.⁴

⁴British North America Act, ss. 96, 97; *Re Toronto and York* [1937] O.R. 177 affirmed [1938] A.C. 415, 107 L.J.P.C. 43, [1938] 1 W.W.R. 452; *Reference re The Adoption Act, The Children's Protection Act, The Children of Unmarried Parents' Act, The Deserted Wives and Children's Maintenance Act*, [1938] S.C.R. 398; *Labour Relations Bd. of Saskatchewan v. John East Iron Works Ltd. and Attorneys General of Canada, Saskatchewan Ontario and Nova Scotia* [1949] A.C. 134, [1949] L.J.R. 66, [1948] 2 W.W.R. 1055; *Toronto v. Olympia Edward Recreation Ltd.* [1955] S.C.R. 454; and *Attorney-General for Ontario and Display Service Co. Ltd. v. Victoria Medical Bldg. Ltd.* [1960] S.C.R. 32.

In the *Toronto v. Olympia* case the Supreme Court of Canada decided that even in an assessment case the original assessing tribunal had no power to decide whether bowling alleys installed in a building were personal property or part of the building, since that was a jurisdiction broadly conforming to the type of jurisdiction exercised by Superior and County Court Judges at Confederation.⁵

The effect of this case went further than holding that the decision of the assessment commissioner was a nullity. It was held that where the assessment was *ab initio* a nullity the courts exercising a statutory jurisdiction of appeal had no power to confirm it or give it validity.⁶

In view of these constitutional difficulties two courses are open to the Province in developing further judicial control over the decision-making process in the exercise of statutory powers:

1. to create an administrative court as a branch of the Supreme Court of Ontario whose judges would be appointed by the Governor-General with a jurisdiction akin to that exercised by the Conseil d'Etat;
2. to develop improved procedures for tribunals exercising statutory powers and simplify the procedures for challenging their decisions in the ordinary courts.

The first alternative we rule out on two important grounds. (1) We do not think the change would be justified on the merits; (2) we do not think that it would be constitutionally acceptable to create a provincial tribunal of the nature contemplated which would be presided over by judges who are appointed on the recommendation of the national Government with powers which when exercised would penetrate the internal administrative processes of provincial and municipal governments in the manner in which the powers exercised by the Conseil d'Etat penetrate the administrative processes of the national and local Governments in France.

⁵[1955] S.C.R. 454, 457.

⁶*Ibid.*, 496-97.

What we have said about the Conseil d'Etat applies equally to setting up a court of the nature suggested by Professor Mitchell, Professors Brown and Garner and the Committee of the Inns of Court Conservative and Unionist Society. In any case the result would be that we would have a court operating in conflict with the ordinary courts with disputes as to jurisdiction and a confusing duplication of judicial procedure. It would require a large outlay of public funds to man and staff these courts and in the end there is no assurance that the rights of the individual would be any better protected than they would be under the improved procedure with respect to judicial review and statutory appeals recommended in Report Number 1.

We are convinced that the second alternative affords the only wise course to be followed in this Province.

Good procedures in the decision-making process in the first instance are the most fundamental safeguards of the rights of the individual against injustice in the exercise of administrative powers.

In Report Number 1 we made recommendations concerning principles that should govern the nature and scope of statutory powers of decision⁷ and we made recommendations for better procedure for appeals and judicial review.⁸ The enactment of a Statutory Powers Procedure Act (1969, Bill 130) which we have recommended would give procedural guidelines for decision-making bodies which would regularize the procedures of those bodies and in so doing remove many of the root causes of complaint and make for better decisions in the first place in the administrative process.

As we have stated earlier, apart from their judicial functions the judges of the Conseil d'Etat perform certain advisory duties with respect to legislation and the preparation of decrees. Under our system the Attorney General is charged with the duty of advising the government on all legal matters. In Report Number 1 we recommended the expansion of the functions of the Attorney General in this regard. We recommended the enactment of an Attorney General Act in which

⁷Chapters 5-7, *supra*.

⁸See p. 1266 ff. *supra*.

the duties of the Attorney General would be clarified.⁹ We do not think that the judges of any court should be charged with the general duty of advising the Executive on legislation. That is the traditional duty of the Attorney General.

Under the Legislative Assembly Act the judges of the Supreme Court are *ex officio* commissioners to report under the Rules of the Assembly in respect of estate bills.¹⁰ This procedure is confined to an examination of private bills brought before the House with respect to the administration of estates. Its purpose is to safeguard specific rights of individuals where special legislation is required in the administration of estates.

We are convinced that no further legislation should be enacted imposing further advisory duties on the judges.

We shall now deal with three areas where it is argued with force that the French system gives better control over the administrative process than our system.

CONTROL OVER "ABSOLUTE ADMINISTRATIVE DISCRETION"

It is contended that we lack a generalized concept like "*détournement de pouvoir*" and that the English courts and our courts do not have a control over "absolute administrative discretion" which gives the court power to go behind the outward appearance of legality and examine the motives of the tribunal which inspired the making of the decision.¹¹

Brown and Garner in commenting on the *Barel* case to which we have referred¹² state that where the administration has an absolute discretion the English law courts have virtually no control at all over the administration, but in French law this applies only to the exceptional case of "*acte de gouvernement*". "In all other cases, although the discretion is absolute, the judge will ensure that the administration has committed no mistake of law or fact (including under the former any infringement of a *principe général du droit*) and is innocent also of any *détournement de pouvoir*."¹³

⁹See p. 995, *supra*. Bill No. 70, 1969, implements this recommendation.

¹⁰Legislative Assembly Act, R.S.O. 1960, c. 208, s. 57.

¹¹See Brown & Garner, *French Administrative Law*, 122, 127, 134.

¹²See p. 1438, *supra*.

¹³Brown & Garner, *French Administrative Law*, 127-28.

We think this statement is too broad. While the French administrative courts may have broader powers than our courts to examine the motives underlying a discretionary decision, together with the facts relied on in coming to the decision, our courts do exercise a very considerable control over decisions made in the exercise of an absolute discretion.

Our courts will examine the purposes of the statute conferring the power and confine the exercise of the discretion to those purposes.¹⁴ In *LaRush v. Metropolitan Toronto & Region Conservation Authority*¹⁵ the Court of first instance and the Ontario Court of Appeal examined the material filed by the Authority with the Minister in support of its application for his approval of the exercise of its power to expropriate. In so doing, Aylesworth, J. A. said: "The documents themselves are the appellant's own records of appellant's proceedings and of the action taken by it. The contents of these documents and anything which necessarily follows from a consideration of their contents bears in the most direct way upon the question of appellant's real purpose. Again that real purpose properly may be tested in the light of the evidence of Mr. Higgs as to the need or the lack of it to acquire respondent's lands for any purpose of conservation of natural resources, . . ."¹⁶ The court held that this material, together with the evidence, showed that the expropriation was not for a purpose falling within the powers of expropriation conferred on the Authority. The expropriation was for a wrong motive and therefore illegal.

Many other cases may be referred to where the Ontario courts and the English courts have controlled the exercise of discretionary powers absolute in form. For example, a *mandamus* was granted ordering a municipal council to issue a licence to operate a salvage yard where the licence had been refused to permit a zoning by-law to be passed.¹⁷ A licensing by-law requiring a minimum street frontage for service stations and imposing certain building restrictions was held

¹⁴*In re Brampton Jersey Enterprises Ltd. v. Milk Control Board of Ontario*, [1956] O.R. 1.

¹⁵[1968] 1 O.R. 300.

¹⁶*Ibid.*, 306.

¹⁷*Wilcox v. Township of Pickering, et al*, [1961] O.R. 739.

to be invalid notwithstanding the discretionary powers of the municipality to pass licensing by-laws, on the ground that it was in its nature a zoning by-law which could only be passed with the safeguards of a hearing before the Ontario Municipal Board.¹⁸

The most recent English case which deals with the control of the exercise of discretionary powers is *Padfield v. Minister of Agriculture*.¹⁹ In this case Lord Denning, dissenting, said in the Court of Appeal:

"But it is said that the Minister is not bound to give any reason at all. And that, if he gives no reason, his refusal cannot be questioned. So why does it matter if he gives bad reasons? I do not agree. This is the only remedy available to a person aggrieved. Save, of course, for questions in the House which Parliament itself did not consider suitable. Else why did it set up a committee of investigation? If the Minister is to deny the complainant a hearing—and a remedy—he should at least have good reasons for his refusal: and, if asked, he should give them. If he does not do so, the court may infer that he has no good reason. If it appears to the court that the Minister has been, or must have been, influenced by extraneous considerations which ought not to have influenced him—or, conversely, has failed, or must have failed, to take into account considerations which ought to have influenced him—the court has power to interfere. It can issue a mandamus to compel him to consider the complaint properly."²⁰

And Lord Pearce in the House of Lords where Lord Denning's view was adopted, said:

"Nor was it intended that he could silently thwart its intention by failing to carry out its purposes. I do not regard a Minister's failure or refusal to give any reasons as a sufficient exclusion of the court's surveillance. If all the *prima facie* reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the court may infer that he has no good reason and that he is not using the

¹⁸*Re Cities Service Oil Co. Ltd. v. City of Kingston*, [1956] O.W.N. 804.

¹⁹[1968] A.C. 997.

²⁰*Ibid.*, 1006-07.

power given by Parliament to carry out its intentions. In the present case, however, the Minister has given reasons which show that he was not exercising his discretion in accordance with the intentions of the Act.”²¹

The conclusion we come to is that if the recommendations contained in Report Number 1 are implemented, the power of judicial review now exercised by the courts, with one procedural exception with which we shall now deal, will be quite adequate to safeguard the rights of the individual in the review of the exercise of absolute discretionary powers of decision.

PRODUCTION OF THE DOCUMENTARY MATERIAL

It is contended that the French administrative courts have through their inquisitorial system more far-reaching powers than the common law courts to secure information regarding the facts and motives underlying a decision of a tribunal. We think this is true. The cases show that in reviewing a decision French administrative courts have a more penetrating power to examine the government records than can be exercised by the common law courts through *certiorari* proceedings.

This deficiency can be remedied without any change in the court structure by giving the Supreme Court power in proceedings for judicial review to require the tribunal whose decision is under attack to produce for the inspection of the court all documentary material that was considered in arriving at the decision, whether it is part of the record or not. We do not think that any order should go further than this. It is not desirable that every application for judicial review be turned into a judicial investigation of the administrative body.

LEGISLATIVE CHANGES AFFECTING GOVERNMENT CONTRACTS

This area is one in which the French system of control appears to provide more substantial justice than can be

²¹*Ibid.*, 1053-54. For other cases dealing with review of administrative discretion see Report Number 1, p. 1104.

attained under our system. This does not involve a matter of procedure but one of substantive law. Under the French law where contracts between the Government and the citizen have been affected by legislative changes in statutes, regulations or by-laws with the result that the contract has been terminated or frustrated or additional expense has been imposed on the contractor the French administrative courts may award compensation. Under English law the courts cannot do so.²² In addition, under the French system a contract may be modified by the court if the public interest so requires subject to the payment of fair compensation. This matter of substantive law may be corrected by legislation without any change in judicial procedure. It is a matter of far-reaching proportions and would require much legal research. It is one more appropriate for consideration by the Ontario Law Reform Commission than for this Commission.

We have come to the firm conclusion that quite apart from the constitutional matters which we have discussed there is no real need shown at the present time for the creation in this Province of a system of administrative courts. We think it is much better that the powers of review of administrative decisions should be vested as it is now in a court with all our tradition of judicial independence.

A court does not and should not review policy decisions but it is the function of the court to see that decisions are made according to law and within the processes provided by law and nothing more. This, we think, can be done in our legal system without the creation of any new courts.

RECOMMENDATIONS

1. A system of administrative courts patterned on the French system should not be adopted in Ontario.

2. A court hearing an application for judicial review should be given power to require the tribunal whose decision

²²See H.W.R. Wade, *Crossroads in Administrative Law*, 21 Current Legal Problems, 75, 76 (1968); Brown & Garner, *French Administrative Law*, 107-08; *Reilly v. R.* [1934] A.C. 176, *Archibald v. R.* (1891) 2 Ex. C.R. 374, *re William Cory & Sons Ltd. v. City of London Corpn.* [1951] 2 K.B. 476, and J. D. Mitchell, *Contracts of Public Authorities*, 32-52, 75-7, 190, 191.

is under review to produce for the information of the court all documents and material which it had before it or considered in relation to the decision.

3. The Ontario Law Reform Commission should be asked to consider what changes in the law should be made to give the courts power to grant relief against hardships where legislative changes have terminated or frustrated contracts made with public authorities, in whole or in part, or made them more difficult of performance than could have been reasonably anticipated when the contract was entered into.

Section 3

A BILL OF RIGHTS FOR ONTARIO

INTRODUCTION

Any organized society must have a legal system to provide the operating rules of social order, from first principles through intermediate levels of standards and rules to final detailed legal decisions applying the laws to particular persons.

This has been as true of the purely customary laws of primitive tribal organizations of early history as it is of the more sophisticated and complex legal systems of modern states. The latter concerns us here, with particular reference to the Province of Ontario both on its own account and as part of Canada.

It is to be emphasized that all laws in a legal system are normative propositions. By that we mean—they are not merely propositions descriptive of fact, but they are directed procedurally or substantively to determining what human conduct ought to be in given circumstances where there is some choice about what it may be, at least within limits set by Nature. In other words, by laws we seek to define and control at critical points the powers rights, duties, liberties and liabilities of the human individuals who are members of a given society in relation to one another. Sir Arthur Goodhart has said:

“The purpose of the society which we call a State is to maintain peace and order within a demarcated territory. It would be impossible to maintain a social life above the bare minimum without an organisation which prevents the arbitrary use of force by one person against another. It is only when order has been established that further progress in civilisation can be achieved. Aristotle expressed this when he said that the State begins by making life possible and then seeks to make it good.”¹

Accordingly, while basic public order is essential, the purpose of the State is not merely to ensure an absence of fighting in the streets. Peace and order in the modern State

¹Goodhart, *English Law and The Moral Law*, 48.

(and in the modern world) are only attainable when the terms on which constituted authorities seek to maintain peace and order are fair, just and reasonable to a degree that attracts acquiescence and loyalty most of the time from most of the people. That is, peace and order are secured through laws that are recognized as laws that ought to be obeyed. Only then can the recalcitrant few who defy law be effectively isolated and brought under control by law enforcement agencies. Even then, when applying the restraints necessary to maintain the essential working structure of society, the law and the procedure for its enforcement must provide for and respect certain basic human rights of those who offend against the law, be they criminals, conscientious objectors or even anarchists.

The world we live in is an imperfect world and a constantly changing one. The pace of change is set by the social effects of modern science, technology and communications and the pace is accelerating. One of the most serious imperfections of the world society is the fact of scarcity. The late Dean Roscoe Pound has pointed out² that the goods of existence (both material and intangible) are scarce in the sense that there are not enough of them for every person to have all he wants of them all of the time. Hence, perfect justice is not attainable in human affairs merely through the public order of a legal system. Nevertheless the holders of public office must do all they can by law at critical points in the total social process to compromise conflicting claims or interests so that the limited goods of existence are rationed for the time being at least, on terms that represent a reasonable measure of justice for the various individuals and groups of individuals of the country concerned.

Fortunately the advances of science, technology, education and mass communication mean that more of the goods of existence are now available for more people than ever before in history. This is one of the pleasanter basic facts of the so-called "affluent society". But the new pace of change also means that governmental institutions must be flexible, adaptable and efficient in designing and implementing new and sophisticated

²Pound, *Juristic Science and Law*, 31 Harv. L. Rev. 1047 (1918); *Social Control Through Laws*.

legal solutions for the pressing problems of social order and justice that have taken on new dimensions of complexity.

We have in Ontario a rich inheritance in English constitutional law and practice. For almost one thousand years, the emphasis in the development of the English Constitution has been a procedural one, concerned with the growth and development of sound institutions and processes. In the Eighteenth and Nineteenth Centuries we in that part of Canada now known as Ontario became beneficiaries of the fruits of this development in our public law and governmental institutions, and we carried them forward into the Confederation period.

It is fair to say that in modern times the British Constitution, as it has operated in the United Kingdom, has been the Western World's most successful system of self-government. The emphasis has been on change by evolution not revolution. There have been some crises in British-Canadian relations, but nevertheless, the transfer of the complete benefits of British governmental institutions and public law to Canada and the Provinces followed the evolutionary rather than the revolutionary path. The emphasis has been on continuity by the use of the legitimate processes of change inherent in the British Constitution.

No one would claim perfection for the British parliamentary, cabinet, public law or judicial systems, nor for the versions of them that have been adopted in Canada and the Provinces. No one denies the need for change from time to time. But, the true continuing worth of established institutions and procedures should be properly assessed in our present circumstances as the essential basis for consideration of necessary changes. Accordingly, it is necessary for us to first examine the nature of constitutions, and the governmental processes and institutions they establish. This we shall do in Subsection 1. Following this examination we shall discuss in Subsection 2 the content of declarations concerning human rights and freedoms and alternate means by which they may be given authoritative status.

Subsection 1

**THE NATURE OF CONSTITUTIONS AND THE
GOVERNMENTAL PROCESSES AND INSTITUTIONS
THEY ESTABLISH**

INTRODUCTION

When people demand a comprehensive "Bill of Rights" declared or defined in some authoritative legal form, what is it they seek? Is it not the age old demand for "justice"?

To write a Bill of Rights is to express in general terms the expectation and claim of citizens that the legal system under which they live shall be just. This claim for justice often appears as a demand for the Rule of Law. In fact, stating what we mean by the Rule of Law is much the same as writing a Bill of Rights. A search for the Rule of Law must necessarily be a search for the rule of just laws.

However one puts it, the search is a wide-ranging one, and basically an ethical one which involves changing and shifting values of human conduct. To pursue the search properly one must appraise the quality and value of all the principal aspects of our legal system as they apply to and control the lives of individuals. The nature and magnitude of this task is not to be under-estimated, but it is well worth doing.

It is to be appreciated that the definition and implementation of a Bill of Rights cannot be done in one simple operation. Adherence to the standards set out in a Bill of Rights is a very complex process. It must allow for and promote continuous progress involving legal change, together with adjustment through the decisions of impartial courts and the legislative action of democratic legislatures.¹

¹For discussion see Prof. Lederman, *The Nature and Problems of a Bill of Rights*, 37 C.B.R. 4, 4(1959).

CHAPTER 101

Characteristics of Constitutional Law

SOME appreciation of the broad sweep of a comprehensive document declaring the rights of individuals can be gained by reading the preamble and the thirty articles of the Universal Declaration of Human Rights of the United Nations. Here are expressed succinctly and in very general terms the qualitative standards which the modern State is expected to meet in and throughout its legal system, in discharging its responsibilities for the welfare of its citizens in a healthy economy. The Universal Declaration is recognized as a great document. It has had a far-reaching beneficial effect as a persuasive and educational document. Nevertheless, reading it leads to the realization that a comprehensive "Bill of Rights" opens up issues of fairness and justice in great detail over the whole range of the public and private law system of the country. All laws are concerned with human conduct in some form. Every law necessarily affects the rights, powers, liberties and obligations of some person or group in relation to other persons or groups. Almost every law defines someone's "right" and imposes some obligation on someone, including officeholders at all levels of government as well as private citizens.

The Federal Government has proposed "A Constitutional Bill of Rights" to bind Canada and the provinces as superior constitutional law. In order to assess this proposal, and the

available alternatives properly, one must first examine the different senses in which the word "constitutional" is used. This is particularly necessary because of the potentially ubiquitous character of such general declarations or catalogues of human rights.

CONSTITUTIONAL LAW IN THE BROAD SENSE

As Sir Ivor Jennings has said,¹ in a sense all law is constitutional law. Even the most particular laws and legal decisions must be legitimate in the sense that their validity can be traced to the first principles of the constitution. The law against theft and convictions under it are valid because the offence is expressed in a statute of the Parliament of Canada, the Criminal Code. The statute is valid because it is "Criminal Law" which is one of the subjects of federal power conferred on the Canadian Parliament under the British North America Act, an Act of the British Parliament, which continues to provide the basic federal law of Canada and give the first principles of the primary division of law-making powers between Canada and the Provinces. But the whole legal system cannot be regarded as superior constitutional law. So when one speaks of a "constitutional" Bill of Rights, one is using the word "constitutional" in a limited sense.

Some jurists divide all laws into two categories, public law and private law, and it is a proper sense of the term "constitutional law" to consider it as synonymous with "public law". This is a more limited, but still very broad sense of the term. It excludes the provisions of private law, the law primarily concerned with relations between private citizens, for example, the bodies of law concerned with property, contract and tort (or delict).

Normally officials in public office do not intervene in the legal relations of private citizens except to vary the content of the laws by legislation, if that is deemed necessary, or to give them authoritative interpretation when disputes arise between private parties in their relations with one another. On the

¹Jennings, *The Law and The Constitution*, (5th ed.) Chapters II, III, Appendix IV; See also Kelsen, *General Theory of Law and State*, Chapters X, XI.

other hand, public law as constitutional law defines all the offices of the State from the highest to the lowest, distinguishing all official persons (office holders) from private citizens. It tells us for instance who are for the time being the members of parliament, the cabinet ministers, the judges, the municipal councillors, the civil servants and the policemen. It tells us how they attain office (by election or appointment) and how they may be removed and replaced from time to time. Public law tells us what the respective powers of office holders are and the procedures they must follow for the valid exercise of their powers—that is, how they are to exercise official discretions, entrusted to them by law. Constitutional law as total public law then is concerned with the definition of public offices and the powers and activities of all official persons as such. Students of the constitution must seek out the general principles or ideas that are implicit in and constitute guidelines for the total of valid official activity.²

CONSTITUTIONAL LAW IN THE LIMITED SENSES

There is however, a narrower use of the term “constitutional law” which is often employed and which confines the sense of the phrase to only a part of public law, the part that is at times found enshrined in some countries in a single document of great authority. Sir Ivor Jennings seems to favour this use of the term. He says:

“The word constitution . . . means the document in which are set out the rules governing the composition, powers and methods of operation of the *main* institutions of government, and the *general principles* applicable to their relations to the citizens.”³

The author cites the Constitution of Ireland and the Constitution of the United States as outstanding examples. He then goes on to point out that you cannot find any similar single document that expresses the constitutional law of

²No doubt there is a twilight zone between public and private law, for example, in the regulation of relations of labour and management in industry. Nevertheless, the distinction stands as a matter of main emphasis.

³Jennings, *The Law and The Constitution*, (5th ed.) 33. (Italics added).

Britain as a superior type of public law. Nevertheless, as he makes clear, the United Kingdom does have a system of public law covering these areas, though its different parts take various legal forms, i.e., customs, conventions, common law dependent upon judicial precedent and ordinary statutes of Parliament. As far as Britain herself is concerned, constitutional law embraces the rules governing the composition, powers and methods of operation of the *main* institutions of government, and the *general principles* applicable to their relations to the citizens, whatever the legal or documentary forms involved in the expression of these rules may be. This is a material definition of constitutional law dependent upon content and not upon form.

There are other formal or procedural definitions of the word constitutional, where, for example, certain principles or rights are said to be "constitutional" because, regardless of content, they are included in a special document, or because an extraordinary method of legal change (amendment) is applicable to them. These other meanings will be discussed later.

A very basic question now arises whether one thinks of constitutional law as the whole of public law or in the more limited sense suggested by Sir Ivor Jennings. Where does sovereignty lie in this official organization and apparatus of the State? Does it lie in a special group of persons or in a special set of concepts or ideas? John Austin's theory of sovereignty is that it lies in a special group of persons.⁴ Unfortunately his theory has had a significant influence on English legal thinking and some still accept its basic premises concerning supreme power or sovereignty in the state.

Austin's Theory of Sovereignty

The Austinian theory of sovereignty was that total and final legal supremacy in the modern state was both personal and fully concentrated on all matters whatsoever. His starting point was to observe the system of order in a particular country and, as a matter of observable social fact, to seek the

⁴Austin, *Lectures on Jurisprudence*, Vol. 1, 223, 247, 261, 269 (1885).

answer to this question: upon which person or group of persons does the obedience of the bulk of society eventually and finally centre? That person or group of persons was for him the sovereign person or group. All other persons in the society were subject to the commands of the superior person or persons. Their commands were the laws. Austin recognized delegation of the commanding power and thus subordinate legislation, but nevertheless, when one traced the delegations to their source, the source was the one sovereign group of actual persons exercising sovereign authority, simply because the sovereign group were the focus of general social obedience. They had the power to accompany their commands with effective sanctions, to be applied against the disobedient members of society. Thus, as Austin put it, sanction is the badge of law, the characteristic mark of all laws.

Austin admitted there were moral and political limitations on the sovereign group of persons, but no legal limitations by constitutional law or any other kind of positive law. By this definition, then, the sovereign group of persons were *above the law*, for they could not be subject to that of which they were the source. The sovereign group were, for him, real and identifiable persons at any given moment in the life of the State.

The Austinian theory then means that the primary group of official persons in the state could put themselves beyond any legal controls whatever. It means, among other things, that there is no such thing as international law, but just certain rules of international positive morality that the sovereign groups of each national State respect or not as they choose and as it suits them. This concept of personification of power becomes of great importance when we come to discuss the constitutional entrenchment of a Bill of Rights.

Austin's principal subject of study was Nineteenth Century Britain, and there he found that the primary or sovereign group were the Members of the House of Commons with the Lords and the Queen, though he did recognize a sort of political trusteeship in the Members of the House of Commons for the benefit of the electorate. Indeed he falls into some confusion on this point.

Dicey's Theory of Sovereignty

Professor Dicey, in his classic Nineteenth Century work, *The Law of the Constitution* stated his view of the legal supremacy of Parliament in this way:

"The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament [the Queen, the House of Lords, and the House of Commons] . . . has, under the English Constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."⁵

"The one fundamental dogma of English constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament."⁶

Dicey added to this Austinian view of Parliamentary sovereignty the idea that nothing was law that would not be recognized and enforced as such by the traditional courts.

The Sovereignty of the Ideas of the People

Austin was wrong to consider that final power in the state at any given time must necessarily be both fully personified and fully concentrated on all conceivable subjects of law-making. In other words, he was wrong to consider that the social obedience of most of the people must centre most of the time on an actual group of superior official persons, persons who would therefore be themselves above the law. This error of the personification of final law-making power is dangerous to the rights of ordinary citizens. The truth lies elsewhere.

It is certain organizing ideas for the relevant society and not certain official persons that are supreme or sovereign. The primary organizational ideas of a modern state are its fundamental constitutional laws. It is those primary doctrines, principles and procedures that are the focus of obedience; they are supreme, not particular persons in office at particular times. It is fundamental to "The Rule of Law" that in the end such enduring ideas are supreme and, therefore, it follows that all officeholders are under the law, none

⁵Dicey, *The Law of the Constitution*, (10th ed. 1961), 39-40.

⁶*Ibid*, 145.

are above it. This principle was recently affirmed as part of the general public law of Canada by the Supreme Court of Canada in the case of *Roncarelli v. Duplessis*.⁷

Law is not primarily a matter of coercion and punishment, rather it is primarily a matter of setting standards for society and devising solutions for critical social problems that attract willing acceptance from most people because those standards and solutions offer some measure of the modern concept of substantial justice.⁸

It is true of course that ideas must live in the minds of people, but the basic ideas of the constitution endure through generations because they are loyally accepted over long periods of time. In this real sense they have objectivity and are not just subjective to particular persons at a particular time. This point has been made with great clarity by the Swedish jurist Olivecrona.

"The machinery of the state is run by an ever changing multitude of persons, acting as monarchs, presidents, heads and members of the government, members of parliament, and so on. In general not one of these persons has even the faintest idea that the law should consist of his commands. Everyone of them finds in existence the rules which are called the law and are on the whole enforced. He can only bring about a change in some part of the law. The bulk of it existed before him and will continue to govern the life of the country when he is gone.

Further it is to be noted that the law givers in general attain their positions and exercise their power by means of the rules of law. The monarch owes his place to the rules of the constitution concerning the succession to the throne, the head of the government has been appointed by the monarch, the members of parliament have been legally elected, and so on. It makes no sense to pretend that the rules which carry these people to their position are their own commands."⁹

Fortunately, the Austinian theory of the English Constitution lived in theory only. It never has represented the working principles of English constitutional law throughout the hundreds of years of historical development leading to its

⁷[1959] S.C.R. 121.

⁸See Lederman, *The Nature and Problems of a Bill of Rights*, 37 C.B.R. 4, 14 (1959).

⁹Olivecrona, *Law as Fact*, 32-3.

present position and content. The true basis of English constitutional law was perhaps first stated by Bracton who, in the Thirteenth Century when the language of the law was still Latin, wrote the first great English legal treatise. He said:

“The King himself ought not to be subject to any man, but he ought to be subject to God and the law, *since law makes the King*. Therefore let the King render to the law what the law has rendered to the King, viz., dominion and power for there is no King where will rules and not the law.”¹⁰

If for “King” you substitute the primary group of official persons for the time being, whoever they are, the modern relevance of Bracton’s words becomes clear. Sir Arthur Goodhart and Sir Ivor Jennings both take this view of the nature of law in general and of the English constitution in particular, rejecting the views of Austin and Dicey.

In his Hamlyn lectures in 1952, Sir Arthur Goodhart set out four principles that he maintains are basic and inter-dependent as the first principles of the English constitution.

- (1) No man is above the law.
- (2) Those who govern Great Britain do so in a representative capacity and are subject to change.
- (3) Freedom of speech, thought and assembly.
- (4) The independence of the judges.

The first is stated to be “the most fundamental one.” After referring to the passage we have just quoted from Bracton, Professor Goodhart goes on to say that the essential freedom of the person prevails in England because the officers of the State are controlled by the law through the writ of *habeas corpus*.

We can do no better than to quote in full what he said as to the second, third and fourth principles.

“The second fundamental principle of the British Constitution is that those who govern Great Britain do so in a representative capacity and are subject to change. The elections that are held are not a meaningless ritual. It is true that at a time of great emergency Parliament is capable of continuing

¹⁰Bracton, *De Legibus et Consuetudinibus Angliae*, quoted by Goodhart, *English Law and the Moral Law*, 56.

its own life from year to year, but if it attempted to do so indefinitely in the time of peace we should all recognize that the Constitution had been destroyed. An immortal government tends to be an immoral government, for it deprives men of that freedom of choice on which free government is based. Professor Fuller, of Harvard, has stated this truth with admirable clarity:¹¹

'The greatness of what we call democratic government does not lie in the mere fact that a numerical majority controls at election time, but at a point further removed from the ballot box, in the forces which are permitted to play upon the electorate. For in the world as it is now constituted, it is only in a democratic and constitutionally organised State that ideas have a chance to make their influence felt. By preserving a fluidity in the power structures of society, by making possible the peaceful liquidation of unsuccessful governments, democracy creates a field in which ideas may effectively compete with one another for the possession of men's minds.'¹²

Here, again, it is true to say that the free election of the members of the House of Commons is a basic principle of English constitutional law. Without 'the peaceful liquidation of unsuccessful governments' the English system would come to an end.

The third basic principle covers the so-called freedoms of speech, of thought and of assembly. These freedoms are an essential part of any Constitution which provides that the people shall be free to govern themselves, because without them self-government becomes impossible. A totalitarian government, which claims to have absolute and unalterable authority, is acting in a logical manner if it denies to its subjects the right of criticism, because such criticism may affect the authority of those in power. To ask that a totalitarian government should recognise freedom of speech is to ask for the impossible because, by its very nature, such a government must limit the freedom of its subjects. On the other hand, such a system of government as exists under the British Constitution must recognise the necessity for freedom of speech and of association, because if public criticism is forbidden and if men are prevented from acting together in political associations, then it would be impossible to make a change in the government by the free, and more or less intelligent, choice of the people.

This does not mean that the constitutional government of a State must recognise that there is a right to advocate the overthrow of that constitution by force, because force is the

¹¹Goodhart, *English Law and the Moral Law*, 56.

¹²Fuller, *The Law in Quest of Itself*, 123.

negation of reason. You cannot argue safely with a man who is threatening to draw a revolver. Like all the rights which the law gives, the liberty which a man has to express his opinions is not an absolute one, but must be exercised within reasonable bounds. It is one of the virtues of the common law that it refuses to go to extremes; the argument that because the law has taken step A therefore it is logical that it should also take the further step B has never impressed the English judges. Having spent little time in the study of metaphysics, they have not been misled by this specious argument. It is because the common-law rights of the Englishman are never doctrinaire that they have such strength and vitality. Here, again, it is obvious that Parliament could not, even if it wished to do so, abolish freedom of speech in this country. It is therefore correct, both in fact and in theory, to say that this limitation is a part of constitutional law.

The fourth and final principle which is a basic part of the English constitution is the independence of the judiciary. It would be inconceivable that Parliament should today regard itself as free to abolish the principle which has been accepted as a corner-stone of freedom ever since the Act of Settlement in 1701. It has been recognised as axiomatic that if the judiciary were placed under the authority of either the legislative or the executive branches of the Government then the administration of the law might no longer have that impartiality which is essential if justice is to prevail.

It is important to point out that the doctrine establishing the independence of the judiciary does not mean that the judges themselves are absolute. They are bound to follow the law they administer. To deny that the judges are subject to the law, because there may be no effective sanction if they disregard it, is to misunderstand the nature of law itself. The judges recognise that they are bound by the law, just as the army recognises that it is bound by the law. If either group refused to obey we would, of course, have a revolution. The only difference between the two would be that the military revolution would be more likely to succeed than the judicial one."¹³

CONSTITUTIONAL DIVISION OF LEGISLATIVE POWERS

Representative parliamentary democracy, responsible government, essential personal freedoms and an independent judiciary having crossed the ocean and become part of the

¹³Goodhart, *English Law and the Moral Law*, 56 ff.

public law in Canada before Confederation, were carried forward into Confederation with respect to the federal and the provincial governments with the essentials of federalism added, primarily those contained in sections 91 to 95 of the British North America Act.

The existence of viable federal constitutions makes clear that personification of primary power was not Austin's only error in his theory of sovereignty. He was also wrong to insist that all legal power on every subject whatsoever must be concentrated in some one set of persons. If the supreme authority lies in ideas and not in present persons then an *original* distribution of law-making powers by classification of subjects is possible and acceptable as the first legislative principle of the constitution. So also is an *original* withholding of ordinary legislative power in certain classes of subjects by a specially entrenched Bill of Rights. This means there is an extent to which the rights and freedoms of the citizen cannot be infringed upon by an ordinary statute passed by an ordinary majority.

In the American Constitution powers are distributed between Congress and the states and all legislative bodies are limited in the exercise of these powers by the constitutional Bill of Rights which cannot be altered except by a very difficult amending procedure that has been seldom used.

Canada has the federal distribution of powers between the central government on the one hand and the provincial governments on the other hand. With very few exceptions,¹⁴ we do not have specially entrenched clauses in our Constitution as do the Americans in their Bill of Rights. We are urged that we should now move more in the American direction in this respect. Also, we are urged to move in the American direction in another respect. We are pressed to express all our essential constitutional law (presumably in accordance with Sir Ivor Jennings' limited sense of "constitutional") in a single document that is more elegant, coherent and inspiring in the literary sense than is the British North America Act.

At present the constitutions of Canada and the Prov-

¹⁴For example B.N.A. Act, s.121 re free trade between the provinces and s.133 re use of English and French language.

inces, in the quite limited sense of the Jennings' definition, are found in a great variety of legal forms, just as they are in England, and it is a serious error to think that the British North America Act either gathers them all into one document or was ever intended to do so. Some of the constitutional essentials are found in the B.N.A. Act, but many more are outside it in federal statutes, provincial statutes, judicial interpretations of the B.N.A. Act, historically received English judge-made public law, conventions of cabinet government, rules of parliamentary procedure and other sources. We do not propose to assess here the "one great document" idea for all things constitutional, but later we shall consider whether there are certain basic human rights and freedoms that should be given authoritative documentary form, and, what the options are for legal and constitutional forms for them.

CHAPTER 102

The Legal Nature of Powers, Rights and Freedoms

THERE is one final general point to be made about constitutions, legal systems and their relation to human rights and freedoms. In strict juristic terminology there is an important distinction to be drawn between powers or rights on the one hand and freedoms or liberties on the other. Powers and rights are quite specific and detailed, properly speaking, and they are defined or given by common law or statute. For example, the power to vote is specifically conferred on citizens who meet certain qualifications under the terms of the appropriate statutes, and election officials have a specific duty to recognize qualified persons. The specific power is spelled out in the law, with corresponding specific duties resting on other persons to give effect to it. The so-called freedoms or liberties are much more general and indefinite in their nature.

It therefore is necessary to make some analysis of the distinction between rights and powers on the one hand and liberties, freedoms and privileges on the other.

Rights, duties and powers, because of their specific and definite obligatory content, belong together for the purpose of analyzing the implications of a Bill of Rights and for this purpose they must be contrasted with liberties, freedoms or privileges which, while they are essential concepts of a legal system, nevertheless lack the specific and detailed obligatory character of rights, duties and powers.

In the Canadian Bill of Rights we find declared "as fundamental freedoms": freedom of religion, freedom of assembly, freedom of speech, and freedom of the press. (We use the term freedom of expression as comprehending the latter two.) What is the juridical nature of these freedoms, liberties or privileges, as they are variously called?

The concept of liberties or freedoms in a duly precise scheme of legal terminology is the concept of areas of option and opportunity for human activity that are residual in nature. These areas of conduct are free of specific legal regulation. In them the individual is free to act or do nothing without legal direction.

The principal object and purpose of a Bill of Rights in a democratic society is to safeguard the essential boundaries of these areas. The basic difference between a democracy and a dictatorship is that in a democracy the areas for the individual's freedom of action are open unless closed. That is, in a democratic society what is not forbidden is permitted, whereas in a totalitarian society what is not forbidden is compulsory.

But, if liberty is a matter of option and opportunity free of legal regulation, in what sense do liberties or freedoms touch and concern the law or depend on it? For example, why is a person's liberty to express a political opinion or worship as he pleases any concern of the legal system? Such options are not directly created or specifically defined by the law or the constitution, as is one's power to vote or one's right to collect a debt. Nevertheless, freedoms or liberties do depend on the legal system. Though they are not the specific creation or gift of the law they depend on the law for their enjoyment. Thus they have their legal features and hence are properly included in the scheme of working jural ideas.

Specific prohibitions found in the Criminal Code and in the law of torts ensure or are designed to ensure peaceful social conditions in which a meaningful choice can be made in the exercise of free options. The laws of crime and tort safeguard each man's areas of option and opportunity against coercion at the hands of others. The laws against trespass and violence safeguard the free enjoyment of the ownership of land, but such laws give no direction with respect to how the

land is to be enjoyed. They just leave the owner in peace. Accordingly, peaceful human activity in areas of freedom depends on basic law and its enforcement. It is in this general sense of dependence on the portions of the legal system relevant to peace and order that it is proper to speak of freedom under the law, or as Lord Wright put it, "freedom governed by law."¹

In addition to furnishing safeguards to areas of freedom and liberty the law defines the boundaries of those areas. What is not forbidden is permitted, but certain things must be and are forbidden. In the words of Chief Justice Duff:

"The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned."²

In other words, to delineate the unregulated area you must first define the regulated area. This is strictly a legal matter. Outside the regulated area the individual is free to choose. In this residual sense the extent of liberty or freedom in some given respect is a matter of legal definition and properly has its place in the working concepts of the lawyer or jurist. For example, as Chief Justice Duff points out, when the law forbids the uttering of defamatory, seditious or obscene words, specific legal prohibition stops. At the boundary so marked freedom of expression starts, and now the law takes no hand at all except to stop riots or other breaches of the peace. Beyond this boundary the law does not tell a man what to say, nor does it compel anyone else to listen to him or to assist him in being heard by publishing in some way what he has said. So far as the law is concerned, he is on his own, and the factors and pressures involved in his choices and efforts concerning self-expression are extra-legal ones.

The residual and unspecified character of liberties or freedoms in relation to specific legal obligations is critical when we come to consider the relation of public legislative

¹*James v. Commonwealth* [1936] A.C. 578 at 627.

²*Reference Re Alberta Statutes* [1938] S.C.R. 100, 133.

power to liberties or freedoms. Freedom of expression, for example, is not a single simple thing that may be granted by some legislature in one operation. It is potentially as various, far-reaching and unpredictable as the capacity of the human mind. Freedom of expression is the residual area of natural liberty remaining after the makers of the common law and the statute law have encroached upon it by creating inconsistent duties with respect to the exercise of this freedom.

This is of great importance in relation to the distribution of law-making power under our federal system of government. It is difficult if not impossible to consider freedom of expression as a single thing that is the subject of a grant by either the federal Parliament or the provincial Legislatures. The federal question is not which legislative authority may give it, but rather which may take it away in any respect. The late Mr. Justice Rand has put it this way:

"Strictly speaking civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery. Their significant relation to our law lies in this, that under its principles to which there are only minor exceptions, there is no prior or antecedent restraint placed upon them; the penalties, civil or criminal, attach to results which their exercise may bring about, and apply as consequential incidents. So we have the civil rights against defamation, assault, false imprisonment and the like, and the punishments of the criminal law; but the sanctions of the latter lie within the exclusive jurisdiction of the Dominion. Civil rights of the same nature arise also as protection against infringements of these freedoms."³

The result is that the power to define the boundaries of the areas of freedom of expression is divided between the federal Parliament and the provincial Legislatures; e.g., the former may exercise its power in the field of criminal law by

³*Saumur v. City of Quebec* [1953] S.C.R. 299, 329.

creating the crime of sedition and the latter may exercise its power in the field of tort law by passing laws relating to defamation.⁴

These peaceful areas of option and opportunity for individuals, free of specific legal regulation or private coercion, are of the greatest importance to the existence of an open, liberal and just society. This should require no emphasis. Modern technology has developed means of private coercion in many subtle and sophisticated forms. The invasions of personal privacy through personality-testing techniques, computerized data banks and electronic eavesdropping devices present new and complex limitations on the ordinary man's elbow room for peaceful and private choice and opportunity. The "right" to be left alone is under siege. The pressures for uniformity are now enormous. They are exerted on individuals through the powers of the mass media of communication, particularly the radio, the television and the printed page in all its forms.

All this leads to the conclusion that the definition and protection of human rights and freedoms through law must be increasingly dynamic and flexible if it is to achieve any reasonable measure of success. Legislative, executive and judicial actions must be properly integrated and co-ordinated under the constitution to this end.

At the outset this fundamental question must be answered: what is the best constitutional blending of parliamentary supremacy and judicial supremacy in defining the issues in determining the means by which human rights and freedoms are to be protected? This is a delicate and difficult question. Serious oversimplification is both easy and dangerous. While much is to be learned from what others have done, this does not mean that the best solution for Ontario or Canada is simply to follow the pattern set by the United States or Britain

⁴We have discussed freedom of expression apart from any inference to be drawn from what was said by the late Chief Justice Duff in *Re Alberta Statutes* [1938] S.C.R. 100 at 133 (discussed at p. 1495 *supra*) with respect to whether the Parliament of Canada or any provincial Legislature can enact legislation limiting or suppressing orderly and free public discussion of public affairs and full and fair criticism of political proposals, all of which is "the breath of life for parliamentary institutions."

or Nigeria or India or the European Community or the United States. The question for us is: what is best for this Province and for Canada? In attempting to answer this question we turn in Subsection 2 to basic considerations of the content and form of rules of law as one of the means of social control in the giving of or the protection of human rights and freedoms.

Subsection 2

CONTENT OF DECLARATIONS CONCERNING BASIC HUMAN RIGHTS AND FREEDOMS AND ALTERNATIVE MEANS OF GIVING THEM AUTHORITATIVE STATUS

INTRODUCTION

As we have stated, all legal rules, principles or standards are propositions concerning what human conduct ought to be in circumstances where there is some choice about what it may be. There are two basic elements of analysis concerning these legal formulations.

First, there are the purely philosophical and logical problems arising out of the level of particularity or abstraction of the literary expression and the system of reasoning used in establishing the standards.

Secondly, quite apart from the substantive content, there are problems arising out of the alternative forms by which authoritative standards concerning human rights may be established: i.e., by the constitution, the legal system of a country, official statements of governmental policy, inter-governmental agreements within a federated state and international agreements.

All these considerations are interrelated. Law is a blending of reason and authority. But to appreciate their interaction, one must first examine them separately. In Chapter 103 the emphasis is on law as reason and in Chapters 104 and 105 on law as authority. In Chapter 106 we shall consider the appropriate blending of reason and authority in the tasks that are or should be entrusted to various constitutional procedures, principles and institutions.

CHAPTER 103

Content of Propositions Establishing Human Rights and Freedoms

THE PARTICULAR AND THE GENERAL

ONE preliminary comment is necessary. In endeavouring to make certain logical and philosophical points it must be appreciated that we are not merely juggling with words. Semantic problems are not in themselves basic and words *are* reasonably adequate vehicles to convey meaning and tools of thinking, though perfection cannot be attained. Communication, thought and social organization are only made possible through the use of words within reasonable limits of objectivity. In speaking of the argument "that the meaning of a proposition is purely subjective because there is always a certain conventional element in language", Professor Morris Cohen said:

"We can, to a very limited extent, like Humpty Dumpty, make words mean what we please. But all convention presupposes communication in a form which is ultimately not conventional but grows out of the fact that the communicants live in a common world and respond in similar ways to similar symbols."¹

Through the exercise of common sense about the use of common words laws can be effectively formulated, published and applied to persons and circumstances contemplated by

¹Cohen, *A Preface to Logic*, 42.

their terms. It is true imperfections or ambiguities of language arise in the process of making and applying laws, and give rise to the constitutional necessity of authoritative interpretation which we shall discuss later. Nevertheless, the main point about the objectivity of words stands. On this footing we proceed to examine the three principal characteristics of defined standards for human rights, powers, freedoms, duties and responsibilities, whether the status be constitutional or otherwise. These three characteristics are: (1) the need for both general and particular propositions for human conduct based on a system of standards; (2) the need to provide for proper discriminations as well as essential equalities in such a system and (3) alternative ways of classifying propositions establishing human rights and freedoms.

THE NEED FOR BOTH GENERAL AND PARTICULAR PROPOSITIONS

Rules of conduct that are intended to be applied to the life of society at critical points must be specific enough, or capable of being rendered specific enough, to make clear to what persons they apply and in what circumstances they are applicable.

However a society of individuals cannot be organized and governed through an indefinite and unsystematic aggregate of particularities. Relevant standards must be framed at reasonable levels of abstract thought, generalizing to some meaningful degree the demands of the members and institutions of the society to which they apply. If we do not generalize enough, we become lost in a forest of particularities; if we generalize too much we reach rarefied levels of abstraction that give little meaningful guidance in the affairs of everyday life. The legislator when framing legislation and the judge when defining law on which he bases his decisions in a particular case are each confronted with this dilemma. In the social context of the subject each seeks a proposition, neither too particular nor too general, to ensure that all persons in *sufficiently* similar circumstances will get the same treatment from the law. This is the root meaning of the concept of "equality before the law" or "equal protection of the law".

The need for a proper range of both particular and general propositions can be illustrated by examples drawn from the field of what currently goes by the name of "consumer protection". Recently the federal Minister of Consumer and Corporate Affairs outlined four freedoms for the consumer purchasing goods, that he wished to promote as a matter of law and policy—freedom of choice, freedom of action, freedom from fraud or deception and freedom from fear of physical or economic injury. The Minister of course does not have unlimited freedoms in mind. One assumes he is thinking of some very desirable but quite specific protective measures for the consumer against monopoly, unfair pricing, misleading advertising, deceitful credit practices of lenders and vendors, dangerously defective products, and so on.

The last point, dangerously defective products, has been the subject of leading cases in the area of judge-made law, perhaps the most famous being the well-known case of *Donoghue v. Stevenson*,² a decision of the House of Lords. This case is an outstanding example of the formulation of general standards by judges to be applied to varying particular circumstances. A young man had purchased a bottle of ginger beer for his girlfriend at a refreshment parlour. Part of the contents of the bottle were poured into a glass for her and she drank some of it. Then the remainder was poured into the glass and a decomposed snail floated out of the bottle. Thereupon the lady suffered shock and severe gastric illness. She sued the manufacturer of the bottle of ginger beer, alleging negligence and claiming damages. These modest and specific everyday facts raised all the issues of "products liability", that is, how far should the law go in holding the manufacturer of goods produced by mass production, liable for dangerous defects in them when they leave his factory, if harm comes to some "distant" consumer?

The law of civil liability for carelessness causing harm has been developed over centuries in England by the judges without benefit of statutes. At first the courts were content with limited propositions about liability for harm done by carelessness in connection with obviously dangerous things

²[1932] A.C. 562.

like fire, poisons, explosives and guns. Gradually it was realized that ordinary articles in everyday use could be dangerous in the absence of care by those in control of them, and the judicial propositions about liability became more general. Finally, in 1932 in the case mentioned, Lord Atkin held the manufacturer liable and went very far indeed in generalizing the liability. He said:

"The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."³

It is to be observed that Lord Atkin recognized the logical relevance and ethical merit of the most abstract and positive of standards: "Love thy neighbour". But he simply ruled it out as a legal proposition because it was something you could not induce people to do by man-made laws. Something relevant, but much more limited, was the best that could be done by the public order of a legal system.

In the judicial opinions in the *Donoghue* case other propositions were offered as the relevant propositions to govern the case in favour of the nauseated consumer—one more by Lord Atkin and others by Lord MacMillan and Lord Thankerton.

"... a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the

³*Ibid*, 580.

knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care." (Lord Atkin)⁴

"In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other." (Lord MacMillan)⁵

"... a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles." (Lord MacMillan)⁶

"... the respondent, in placing his manufactured article of drink upon the market, has intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods between himself and the consumer that he has, of his own accord, brought himself into direct relationship with the consumer, with the result that the consumer is entitled to rely upon the exercise of diligence by the manufacturer to secure that the article shall not be harmful to the consumer." (Lord Thankerton)⁷

The three judges quoted were the majority and decided in favour of the injured consumer for the reasons respectively given as quoted.

A number of relevant points arise out of this example. These propositions are all logically consistent in that they lead to the same result for the injured consumer on the actual facts. Nevertheless, they all differ in their respective scope or potential for settling future cases of dangerous conduct or defective products. In this regard the more particular propositions are more detailed and cover less ground than the more general ones. No judge became painfully and completely particular; no judge said that his rule was *only* for cases where snails got into bottles of ginger beer in the bottling works of

⁴*Ibid*, 599.

⁵*Ibid*, 619.

⁶*Ibid*, 620.

⁷*Ibid*, 603.

a ginger beer manufacturer. The logical and philosophical possibilities emerging from this example are very great. The range of choices is wide indeed concerning the content of standards (normative propositions) to define liability for various types of dangerously careless conduct.

This is the difficulty that always confronts a legislator when framing a rule for liability that is to be given authoritative status as a statute, and likewise the judge who frames a rule for liability that is to have the authority of judicial precedent. Each must generalize to some sensible degree in framing the rule appropriate to the specific facts before him. For the judge there may be no governing statute, or the statutory principles may be so highly abstract that he, the judge, must frame the more particular set of propositions that bring the statutory abstractions close enough to the specifics of everyday life. This is how judicial interpretation fills out and develops the meaning of statutes, something to which we shall return later when considering what is the proper blending of parliamentary and judicial supremacy in the constitution. The point about the multiplicity of choices among possible standards has been made with great clarity by Professor Julius Stone. In his book entitled *Legal System and Lawyers' Reasonings* using the snail-in-the-bottle case as an example he said:

"The range of fact-elements of *Donoghue v. Stevenson*, standing alone, might be over-simplified into a list somewhat as follows, each fact being itself stated at alternative levels.

(a) *Fact as to the Agent of Harm*. Dead snails, or any snails, or any noxious physical foreign body, or any noxious foreign element, physical or not, or any noxious element.

(b) *Fact as to Vehicle of Harm*. An opaque bottle of ginger beer, or an opaque bottle of beverage, or any bottle of beverage, or any container of commodities for human consumption, or any container of any chattels for human use, or any chattel whatsoever, or any thing (including land or buildings).

(c) *Fact as to Defendant's Identity*. A manufacturer of goods nationally distributed through dispersed retailers, or any manufacturer, or any person working on the object for reward, or any person working on the object, or anyone dealing with the object.

(d) *Fact as to Potential Danger from Vehicle of Harm.* Object likely to become dangerous by negligence, or whether or not so.

(e) *Fact as to Injury to Plaintiff.* Physical personal injury, or any injury.

(f) *Fact as to Plaintiff's Identity.* A Scots widow, or a Scots-woman, or a woman, or any adult, or any human being, or any legal person.

(g) *Fact as to Plaintiff's Relation to Vehicle of Harm.* Donee of purchaser from retailer who bought directly from the defendant, or the purchaser from such retailer, or the purchaser from anyone, or any person related to such purchaser or donee, or other person, or any person into whose hands the object rightfully comes, or any person into whose hands it comes at all.

(h) *Fact as to Discoverability of Agent of Harm.* The noxious element being not discoverable by inspection of any intermediate party, or not so discoverable without destroying the saleability of the commodity, or not so discoverable by any such party who had a duty to inspect or not so discoverable by any such party who could reasonably be expected by the defendant to inspect, or not discoverable by any such party who could reasonably be expected by the court or a jury to inspect.

(i) *Fact as to Time of Litigation.* The facts complained of were litigated in 1932, or any time before 1932, or at any time.⁸

Professor Stone's list makes it clear that, if we go beyond what the judges actually said in this example and examine the whole range of the logical possibilities of what in reason they *might* have said, we get literally hundreds of propositions each of greater or lesser generality and of varying scope for the future. Yet each one would result in judgment for the injured consumer in *Donoghue v. Stevenson*. What is the right level of generality and kind of potential for the future that the legislator or the judge should settle upon, the former in drafting a statute and the latter in creating a judicial precedent?

As we have pointed out earlier, we are dealing here with the heart of the problem of "equality before the law" or "equal protection of the law", and the true complexity of this problem emerges in the light of Professor Stone's reasoning. Other

⁸Stone, *Legal System and Lawyers' Reasonings*, 269-70.

persons in the future who find themselves in sufficiently similar circumstances to those of the parties in *Donoghue v. Stevenson* will expect, and are entitled to expect, the same treatment from the law.

It is fundamental to justice that the legal system should strive for consistency at some understandable and acceptable level of generality or abstraction. The legislator or the judge decides what he deems to be "sufficiently" or "essentially" similar by his choice of standards of some sort to express the law, and this is a choice between a great many possible and relevant propositions. The delicacy and difficulty of this problem of choice is to strike a just and meaningful level of generality for the type of issue in hand, to be neither too general nor too particular.

As pointed out by Lord Atkin in the *Donoghue* case, we cannot simply tell everyone to love his neighbour and let it go at that. We are always dealing at some lesser and intermediate level of generality. Furthermore, complex problem areas in our social life can never be resolved in terms of just one relatively simple statement of standards.

For example, when legislators frame a statute about consumer protection, one finds in the statute a series of standards of varying generality about the subject running from some selected lower level of particularity to some selected upper limit of abstraction. But a set of standards that is either too particular or too abstract will fail as an effective regulation of the problem area concerned, regardless of the authoritative status with which the propositions may have been invested by statute or judicial precedent or even by special entrenchment in the constitution.

This leads to three points in the nature of corollaries that should be made about the need for both general and particular propositions in a system of standards.

First, both as a matter of meaning and implementation, highly general propositions are neither self-defining nor self-executing. Their meaning for operational purposes must be further developed by more detail. This is done by reducing their level of abstraction with more precise and limited terms, by adding to them general or specific exceptions or conditions

and, in any event, by connecting them to the specifics of everyday life through a series of relevant but progressively more particular standards.

Second, highly abstract and general propositions in themselves do have great importance as “directive principles” in setting general guidelines defining the goals or the ideals of a society. Among other things, they have an important educational influence.

Third, it is characteristic of sets or groups of highly abstract statements of standards of the goals or ideals of a society that they overlap one another and conflict in many ways, leading to the necessity for preferences or compromises. The reasonable processes of preference and compromise also call for the extensive development of detail, that is, for more precision in terms and for general and specific exceptions or conditions. These three points require some further development.

Meaning and Implementation of General Propositions

We have said that, as a matter of meaning and implementation, highly general propositions are neither self-defining nor self-executing. Their authoritative formulation, their interpretation and finally their application to the persons and circumstances contemplated by their terms is accomplished by the initiatives and decisions of the holders of public office and by private citizens, following appropriate procedures laid down at all levels of government under law.

Take the example of due process of law in criminal procedure. The Universal Declaration of Human Rights of the United Nations provides as follows:

“Article 9. No one shall be subject to arbitrary arrest, detention or exile.

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11(1). Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

On the surface it would appear that these standards are reasonably well met throughout Canada. Nevertheless, to make a proper assessment of this, it is necessary to consider a whole mass of particular rules necessary to implement these principles. One must consider the judicature statutes and the codes of criminal procedure, including the laws relating to evidence, confessions, burden of proof, bail, habeas corpus and so on. The procedural sections of the Criminal Code of Canada alone cover more than one hundred pages in the statute book, and there are thousands of pages of authoritative judicial interpretation of the statutory provisions. These judicial precedents particularize still further the statutory provisions.

The point is, when we consider all this detail, it is clear that the secret of the fairness of a criminal trial rests not merely on declarations such as Articles 9, 10 and 11 (1) of the Universal Declaration but on the independence of the judges presiding in the courts and specific and detailed rules such as the following: the charges must be stated with precision and particularity so that the accused knows exactly what allegations he must meet; the prosecution must prove the guilt of the accused beyond a reasonable doubt; a statement made to the police or anyone in authority cannot be used in evidence against the accused unless it is proved to have been given voluntarily in the legal sense. Before Articles 9, 10 and 11 (1) can be really effective there must be a good system of legal aid. This is particularly true of Article 10. If there is to be "equality before the law" or "equal protection of the law" a good system of government sponsored legal aid is essential. Professor L. A. Sheridan has spoken of this implication in his comment on fundamental liberties in the Constitution of the Federation of Malaya.⁹

Likewise, the Deputy Secretary-General of the Council of Europe speaking at the Conference on the European Convention on Human Rights held in Vienna in October, 1965, said:

"On 25 October 1963, the Committee of Ministers, at the suggestion of the European Commission of Human Rights, introduced a system of legal aid. After working for ten years, we realized that a number of applicants did not have the financial

⁹Sheridan, *The Federation of Malaya Constitution*, 11.

means to engage a lawyer or to travel as far as Strasbourg to defend their applications before the Commission. Already the Commission has granted two requests for legal aid. The fact that an international tribunal is able to grant legal aid is of great legal importance and should be stressed."¹⁰

A publicly financed legal aid plan has been in effect in the United Kingdom for several years. The Province of Ontario put in force a comprehensive legal aid plan in 1966¹¹ which followed and improved upon the British plan.

It is clear that if the general declarations contained in Articles 9, 10 and 11 (1) of the Universal Declaration are not supported by a well-developed set of detailed rules and administrative resources, they would accomplish little. They are just words on paper. It can be said without any reflection on the United Nations or the Universal Declaration of Human Rights that just procedures such as a rule and practice of no arrest unless arrest is necessary in the circumstances, a legal-aid lawyer readily available, and an efficient and just bail procedure can do much more to protect the rights of the individual in actual practice than all the resources of the United Nations.

It is however going much too far to claim that general declarations of rights are either unnecessary or useless. But it can be said with some confidence that if you have proper detailed rules and procedures for a fair hearing where the rights of the individual are involved the necessity for highly abstract general exhortations on the subject of human rights is greatly reduced. It is the detailed legal provisions for fair hearings that a man who has been taken before a court or any other tribunal looks to for protection not general declarations whatever their authoritative legal status may be. The common-law lawyer, if put to the choice between the general declarations and the detailed rules of law and procedure, will readily choose the latter and he would be right to do so. But this is not something that requires a choice. The matter does not end there. There is a positive advantage to be derived from both the general and the particular.

¹⁰Mr. Polys Modinos, as reported at p. 364 in *Human Rights in National and International Law*, (1968), edited by A. H. Robertson.

¹¹See Ont. 1966, c.80.

Abstract Declarations of Principles as Guides

This brings us to the second of the three corollaries respecting the need for both general and particular propositions in a system of standards. Highly abstract principles do have great importance in themselves simply as directive principles concerning the goals and ideals of a society. Although it is true that general declarations of principles mean little unless worked out on a massive scale in precise detail, we must appreciate the general implications of what it is we are doing in precise detail. Particular detailed rules cannot be properly understood or applied as parts of a reasonable scheme or system unless we pursue as far as possible the general implications involved in them. Only then can we bring order and purpose to the mass of detail in our laws. The late Roscoe Pound of the Harvard Law School has said:

“William James tells us that ‘the course of history is nothing but the story of man’s struggle from generation to generation to find the more inclusive order’. Certainly such has been the course of legal doctrine In law this means an endeavour to eliminate the arbitrary and illogical; a conscious quest for the broad principle that will do the work of securing the most interests with the least sacrifice of other interests, and at the same time conserve judicial effort by flowing logically from or logically according with and fitting into the legal system as a whole.”¹²

The point is that general principles and their detailed implications are all part of a legal or constitutional system. They are complementary one to the other. The general controls the mind in dealing with the particular. There is necessarily a constant interaction between the more general and the more particular in a living legal process, always conceding that it is beyond man’s capacity to be ultimately general or finally particular in creating standards. The upper and lower limits of abstraction are relative, not absolute, for legal and constitutional purposes.

¹²Pound, *Juristic Science and Law*, 31 Harv. L.R. 1047, 1062-3 (1918). See also Pollock, *A First Book of Jurisprudence*, (2nd ed.) 81.

For example, when one reads the thirty articles of The Universal Declaration of Human Rights of the United Nations, one can see that most if not all of these very abstract and succinct propositions are derived from (that is, logically express the general implications of) the modern constitutions and legal systems of the western democratic nations like Britain, Canada, the United States and France. For example, Article 25 of the Universal Declaration states in part:

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

Similar to Articles 9, 10 and 11 in relation to the right to a fair trial this Article compresses into a brief abstract statement the purport of the development of the positive state and the welfare state in Western countries during the past one hundred years. It gives the general implications of thousands of pages in the official books of statutes and regulations covering children’s allowances, old age pensions, health and unemployment insurance, workmen’s compensation schemes, graduated income taxes and so on. The intellectual striving for valid generalizations—for what Dean Pound has called the basic “jural postulates” of the time and place—is characteristic of the advance of reason and knowledge in all major fields of human endeavour, including that of constitutions and legal systems.

The acceptance of a constitution and legal system, as we indicated earlier is not just a matter of inertia or force. It requires that the terms on which constituted authorities seek to maintain peace and order should be in the main, fair, just and reasonable to a degree that positively attracts acquiescence most of the time from most citizens. Accordingly, the directive and educational influence of the valid generalization is most important, even though it does not define and execute itself for the specifics of everyday life.

Sets or Groups of General and Abstract Statements Overlap and Conflict with the Particular

We come now to a paradox, which is the third of the general points to be made about the need for both general and particular propositions in a system of standards. The significant sets or groups of these general principles overlap and conflict in many ways, requiring legislators and judges to work out preferences and compromises.

It may be put this way. One of the difficulties with general principles is that at times they overlap and conflict so far as their relevance to particular problems is concerned. For example, the Universal Declaration says in the first part of Article 23 that "Everyone has the right to work" and in the last part that "Everyone has the right to form and join trade unions for the protection of his interests." The union shop or even the closed shop may well be vital to the effectiveness of trade union organizations, and yet they deny the man who as a matter of conscience refuses to meet the conditions of union membership the right to work at the employment of his choice. Right-to-work laws promoted in several of the states of the United States are directed against the union shop and the closed shop. Which rights should have precedence, those of the individual man or the organization man? And what of the interests of the whole community of citizens? To give another example, the Universal Declaration speaks of freedom of religion and of freedom to manifest one's religion "in teaching, practice, worship and observance". But it speaks also of the right to medical care, education and of the right to life itself. Are parents entitled in the name of free observance of sincere religious beliefs to deny to a child the blood transfusion that would save its life, or to deny it all normal education because the state school system is regarded as wicked?

Such issues of conflict arise again and again in any legal system, whether or not there is a formal Bill of Rights. One of the principal tasks of legislators and judges is to work out compromises that resolve such conflicts as far as possible on fair terms, and to give these compromises expression in legal decisions and rules. A Bill of Rights very properly directs our

minds to the general implications for justice of detailed legal action. But it is quite illusory to think that a Bill of Rights will do away with difficult conflicts between different persons and groups of persons. No rights or freedoms are absolute. There will always be need for painful compromise at many points in the operation of any legal system. The Universal Declaration of the United Nations itself recognizes that this is so. Article 29 provides:

- “1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.”

Conflict is often resolved by resorting to specific exceptions or conditions. The property section in the Chapter on fundamental rights in the Constitution of Nigeria is an instructive example. It reads:

“31. (1) No property, movable or immovable, shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except by or under the provisions of a law that:

(a) requires the payment of adequate compensation therefor; and

(b) gives to any person claiming such compensation a right for the determination of his interest in the property and the amount of compensation, to the High Court having jurisdiction in that part of Nigeria.

(2) Nothing in this section shall affect the operation of any law in force on the thirty-first day of March, 1958, or any law made after that date that amends or replaces any such law and does not:

(a) add to the kinds of property that may be taken possession of or the rights over and interests in property that may be acquired;

(b) add to the purposes for which or circumstances in which such property may be taken possession of or acquired;

- (c) make the conditions governing entitlement to any compensation or the amount thereof less favourable to any person owning or interested in the property; or
 - (d) deprive any person of any such right as is mentioned in paragraph (b) of subsection (1) of this section.
- (3) Nothing in this section shall be construed as affecting any general law:
- (a) for the imposition or enforcement of any tax, rate or due;
 - (b) for the imposition of penalties or forfeitures for breach of the law, whether under civil process or after conviction of an offence;
 - (c) relating to leases, tenancies, mortgages, charges, bills of sale or any other rights or obligations arising out of contracts;
 - (d) relating to the vesting and administration of the property of persons adjudged or otherwise declared bankrupt or insolvent, of persons of unsound mind, of deceased persons and of companies, other bodies corporate and unincorporate societies in the course of being wound up;
 - (e) relating to the execution of judgments or orders of courts;
 - (f) providing for the taking of possession of property that is in a dangerous state or is injurious to the health of human beings, plants or animals;
 - (g) relating to enemy property;
 - (h) relating to trusts and trustees;
 - (i) relating to the limitation of actions;
 - (j) relating to property vested in bodies corporate directly established by any law in force in Nigeria;
 - (k) relating to the temporary taking of possession of property for the purposes of any examination, investigation or enquiry; or
 - (l) providing for the carrying out of work on land for the purpose of soil-conservation.
- (4) The provisions of this section shall apply in relation to the compulsory taking of possession of property, movable or immovable, and the compulsory acquisition of rights over and interests in such property by or on behalf of the state."

It is apparent that those who composed this clause entrenched as it is in the Federal Constitution were seriously worried about (i) altering existing property laws and (ii) inhibiting future property or tax legislation by an ordinary statute in

aid of other principles, such as public health and safety, to which private property rights should at times be subordinated. One asks what is left of the *special entrenchment* of property rights when effect is given to the exceptions and conditions.

At least the Nigerian clause does speak of "adequate compensation". But what is "adequate" or "just" compensation if the old private property system is considered to need major modification as a matter of overriding social need? Is the old private property free market then to be the test of the amount of compensation?

In the case of the Indian Constitution there was great difficulty on this point, because an oppressive form of tenant land tenure was prevalent and the Congress Party was committed to basic reform of it. What happened to the specially entrenched "due process" clause concerning compulsory acquisition of property, by virtue of several amendments to it, has been described by the author, Granville Austin (writing in 1964) in this way:

"Thus in the nine years from 1947 to 1956 had the demands of the social revolution taken the right to property out of the courts and placed it in the hands of the legislatures. Good sense, fairness, and the commonweal might still be served, but so far as property was concerned, due process was dead."¹³

The reason seems to have been that India simply could not afford to compensate landlords at full market rates, nor on the other hand could she forego reform of land tenure.

In a very different social context, much the same sort of thing happened in Northern Ireland. The paramountcy of the British Parliament at Westminster still obtains respecting Northern Ireland, and speaking of the *Government of Ireland Act, 1920*, Professor S. A. de Smith says:

"The Act also forbade the taking of property without compensation; but this provision was found to give rise to uncertainty regarding the constitutionality of town and country planning legislation, and was repealed in 1962."¹⁴

¹³Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, (1966) 101, and see pp. 97 to 101.

¹⁴de Smith, *The New Commonwealth and Its Constitutions* (1964) 172. And see also generally Keeton, *The United Kingdom* (1955), 437, Volume I in *The British Commonwealth: The Development of Its Laws and Customs*.

So far as the Parliament of Northern Ireland was concerned, this "due process" requirement respecting property had been specially entrenched. It is true of course that new land planning and zoning legislation does indeed alter the content of the rights, powers and privileges of land-owners respecting their land, and thus alters the economic value of ownership. Hence the apprehension was well-founded.

Enough has been said now to illustrate the need for both general and particular propositions in formulating defined standards that speak of human rights, powers, freedoms, duties or responsibilities, in the logical and philosophical sense of what is necessary to define and promote selected human values in a meaningful way. We turn now to the second of three principal characteristics of defined standards as we set them out at the beginning of this Chapter. This concerns the relation of equality and discrimination in the content of a system of standards concerning the conduct of human individuals.

THE NEED TO PROVIDE FOR PROPER DISCRIMINATIONS AS WELL AS ESSENTIAL EQUALITIES

Every legal system defines, as it must, the persons to whom it applies as right and duty bearing units. The natural legal person is the human individual.

It has been an article of faith in Western liberal countries, at least since the rather recent abolition of slavery, that each human individual is entitled as a legal person to recognition as the primary unit of the constitution and its concomitant legal system. But this does not mean that every human individual enjoys in all respects exactly the same rights, powers, and duties under the law.

There is a basic common humanity of all human individuals that requires equal treatment from the law in relevant respects. For example, the criminal laws and tort laws forbidding physical harm to the person are designed to protect everyone from harm. So are the requirements for fair procedure in criminal cases and freedom from arbitrary arrest by public authorities. There are however some differences between individuals in their inherent characteristics or in their functions

or in their circumstances in society, which call for differential treatment by the law. Justice requires proper discrimination as well as essential equalities. The law in fact, establishes many proper discriminations which under the law give rise to special treatment of one sort or another for limited groups of persons.

Children and Mentally Ill Persons

The most obvious example is that under the criminal law children are treated differently from adults. In most jurisdictions a different procedure is prescribed for young persons up to sixteen or eighteen years of age.¹⁵ This is intended to be protective for the juvenile, but the intention may miscarry and deprive the juvenile of safeguards of procedural due process that every individual should enjoy. In civil matters the age discriminating between classes for many purposes is twenty-one years. Children and young persons cannot vote, nor can they make commercial contracts (with certain exceptions) or convey real property that they may own.

The Criminal Code discriminates between children of different ages and between children and adults for the purpose of criminal responsibility.¹⁶

The different treatment accorded to children and quite young persons is in principle a proper attempt to give them special guarantees of care and protection under the law because in fact they may lack the inherent capacity of adults to protect themselves and to make responsible judgments. One may argue about what the proper age limit for this protection is, but that does not alter the necessity for protective legal discrimination in the name of justice for sufficiently young persons.

The same sort of discrimination exists with respect to the special incapacities and protective measures provided for mentally incompetent persons and the certification and hospitalization of persons as insane. This we discussed in Report Number 1.¹⁷

¹⁵See Report Number 1, p. 572 ff.

¹⁶Criminal Code, ss. 12, 13, 139, 143, 144.

¹⁷See p. 1231 *supra*.

In relation to the right to vote we pointed out that the electoral statutes of Canada and Ontario are in some disorder on this matter. We said:

"A comparison of the provisions of the provincial and federal Acts shows that some persons prohibited from voting in a national election may vote in a provincial election. Can it be said that those who are voluntary patients, or who, under the Mental Health Act will be informal patients, are 'restrained of their liberty of movement'? The confinement to a hospital or the restraint on liberty because of illness are not the proper tests to apply to the right to vote. The test should be the extent of the mental illness, which would be subject to certification or the order of the court in proper cases."¹⁸

There are many other examples of proper discrimination under the law. As has been noted the Universal Declaration of the United Nations calls for the State to assume important welfare functions. This is done by legal discriminations of a protective or beneficial character. The right to old age pensions is given to persons over sixty-six. Needy widows and children are in a special category and so are the unemployed.

Special Groups

Examples of proper legal discriminations exist in the areas of qualification for political privileges or particular occupations or professions. Landed immigrants and resident or visiting aliens are groups in different legal positions in certain respects than are the group or class of residents who are citizens. Questions necessarily arise of course—naturalization laws permit the landed immigrant or alien to become a citizen on certain terms, and whether these terms are fair is itself a question that must be kept under review.

The various professions recognized by the law are status-groups with special functions in society. These functions depend on the acquisition of special learning and training that must be defined and certified. Members of a profession then are, by definition, in a position to profess to be able to do something for the lay public that laymen either cannot do

¹⁸pp. 1235-36.

at all for themselves, or at least cannot do as well for themselves as the professional can do it for them. So professional men, e.g., in medicine or law, are given a monopoly in the public interest of the right to practice their respective professions. Self-government for a professional group both as to qualification and disqualification is essential up to a point, but there must be safeguards in the public interest, and in the interest of candidates for entry to the profession or of individual professional men threatened with disqualification. These issues concerning the self-governing professions and occupations have been reviewed and made the subject of certain recommendations for reform in Chapters 79 to 85 of Report Number 1.¹⁹ In fact equality of opportunity arises in the administration of all occupational licensing schemes and in trade union activities.

Corporate Bodies

The position of corporate bodies as legal persons presents a very complex aspect of legal personality. The literature on the subject fills libraries. Nevertheless, there are a few quite simple points to be emphasized relative to the subject of discrimination that can at least be delineated. The corporate person created by the State should be treated for some purposes as if it were a natural legal person (a human individual) but certainly not for all purposes.

The usual business or industrial corporation is a legal entity constructed by law analogous to the only natural legal person, the human individual. The unity of the corporation is an organizational unity given status by the law and not by nature as is the organic unity of the human individual. But it is not accurate on this account to designate the corporation as "artificial". Its organizational unity is real enough, and so are the corporate purposes. The human individuals involved in pursuit of those purposes, whether as officers, directors, shareholders, or employees are real. The physical and financial assets dedicated to the corporate purposes under the regime of company law are real. None of these is artificial. This view of the nature of corporate bodies is favoured by Dr. Martin

¹⁹See p. 1162 ff.

Wolff in his famous essay *On the Nature of Legal Persons*. He points out that this is the essence of the fiction theory of corporate legal personality, the theory most widely accepted in the common-law world. The word "fiction" is employed here in the sense of abbreviation and analogy, not in the sense of unreality and untruth. Dr. Wolff puts it this way:

"To sum up: The value of the fiction formula is that it starts from a natural, extra-juristic conception of personality, as founded in ethics and religion and then adds that certain groups and institutions determined by law, though lacking in supreme, that is human dignity, are nevertheless treated by law as if they were human persons. I believe that lawyers should lay stress on the intertexture of law with other values governing human life, conduct and thought. Those who advocate isolated jurisprudence may reject the fiction formula."²⁰

Accordingly, the corporate body is an organization of human individuals who have certain limited objectives in common. The corporation is empowered to carry on to some extent as a legal unit as if it were itself a single human individual apart from its officers, directors, employees, and shareholders. Nevertheless, the analogy only holds good for limited purposes. To regard a corporation as if it were itself a single separate real person is accurate enough as a figure of speech if one is thinking of the normal operation of the corporation as a going concern in relation to outsiders. But many issues concerning corporations can only be properly considered in the light of the true complexity of the corporate organization, and the more difficult the problem the more true this is. Examples include the special rights of minority shareholders and the constitutional status of a dominion company in relation to provincial legislation under our federal constitution. The late Professor Hohfeld has said this of the corporation:

"When all is said and done, a corporation is just an association of natural persons conducting business under legal forms, methods and procedures that are *sui generis*. The only conduct of which the state can take notice by its laws must spring from natural persons—it cannot be derived from an abstraction called 'the corporate entity.' . . . ultimately the responsi-

²⁰Wolff, *On the Nature of Legal Persons*, 54 L.Q. Rev., 494, 507 (1938).

bility for all conduct and likewise the enjoyment of all benefits must be traced to those who are capable of it, that is, to real or natural persons.”²¹

While the corporation may be a person by analogy, taking the analogy too literally or carrying it too far may lead to the oppression of human individuals and their financial loss.

In the United States in the nineteenth century and the earlier decades of the present century, the Supreme Court of the United States ruled that corporate persons were on the same footing as human individuals for purposes of the “due process” clauses of the Fifth and Fourteenth Amendments of the American Constitution. Since these were entrenched clauses, the Supreme Court in effect had the last word on their meaning. In construing their meaning, the Court also developed what is known as substantive due process. The proposition that no one was to be deprived of life, liberty or property without due process of law was read, among other things, as meaning that no person was to be deprived of his liberty to contract freely, that is, to get the best terms he could by private bargaining. The same judicial blessing was conferred on existing rights of private property.

The result of this recognition of corporations as persons for all purposes, combined with substantive due process, was, alarming and far-reaching. The courts invalidated legislative attempts to fix maximum hours of work and minimum wages, (the *Adkins* case²² and the *Lochner* case²³).

The decisions of the Supreme Court of the United States continued along this line of constitutional reasoning until well into the 1930's when the economic pressures of the great depression brought about a change of course. The effect of these decisions ought not to escape attention when considering whether a Bill of Rights should be entrenched in the Canadian constitution and if so to what extent.

When the Court gave a corporation all the benefits accruing under the Constitution to an individual human being it

²¹See Lederman, *Legislative Power to Create Corporate Bodies and Public Monopolies in Canada*, in *Contemporary Problems of Public Law in Canada* (1968) 113-14.

²²*Adkins v. Children's Hospital* (1923) 261 U.S. 525.

²³*Lochner v. New York* (1905) 198 U.S. 45.

gave corporations great and small, vast powers of oppression free from interference by any legislative body. While on the other hand, as Professor Friedmann pointed out, "the court was less effective in preserving what was undoubtedly the underlying principle of the Fifth and Fourteenth Amendments, *viz.*, the effective personal and civic equality of persons, races and classes within the United States. The most obvious violation of this principle, the poll tax, and other enactments effectively disenfranchising the Negro population in many of the southern states, remained unchecked."²⁴

It took a political storm with political threats to expand the United States Supreme Court by appointment to the Court of judges who would be more responsive to public opinion and an ultimate re-construction of the Court during the Roosevelt term to bring about a reversal in the trend of the Court's decisions. Of this, Professor Friedmann has said:

"The approach first outlined by Holmes, and developed in particular by Brandeis and Cardozo, won the upper hand with the appointment of several new justices. Its most important aspect was a greater consciousness of the limitations of the non-elected organ of the Constitution, and a correspondingly greater deference to the function of the elected legislature in matters of economic and social legislation. At the same time the court came to abandon the doctrine that economic activities of the state are necessarily 'non-governmental.' The number of economic and social statutes declared unconstitutional declined drastically, and the court has on the whole maintained this attitude, which agrees with the substance of Holmes' dissenting judgment in the *Lochner* case. At the same time the court displayed a new energy and firmness in the interpretation of those parts of the Constitution which protect basic human rights and notably those guaranteeing racial and civic equality."²⁵

For the purpose of the present analysis, it can be seen that it was a grave error to treat corporate organizations for purposes of the "Bill of Rights" clauses of the American Constitution as if they were in exactly the same position as human individuals. This left the individual employee and consumer alone, to get the best terms he could in contract by private

²⁴W. Friedmann, *Legal Theory* (1960 4th ed.) 91.

²⁵*Ibid.*, 92.

bargaining with a powerful corporate organization. Corporate bodies have rights that should be respected, but frequently they are great centres of private power, extending into internal government and often international in their scope. They cannot be treated for all purposes as if they were single human individuals.

Any attempt to frame a charter of human rights and freedoms must deal with the problem of the corporate person or it may seriously miscarry in its effect on human individuals. For purposes of the rights of human individuals, the problem of the corporate organization should be approached in the spirit of the quotation we have made from Professor Hohfeld: that is, the concern should be with the position of the human individuals who are shareholders, officers, employees and the consumers.

Fortunately, the severe limitations of the analogy between the human individual and the corporate "person" have become increasingly understood; hence a vast body of statutes and judicial precedent has developed concerning regulation of the sale of company securities, rights of minority shareholders, prohibition of monopolies and undue combinations in restraint of trade, requirements for collective bargaining in good faith with labour unions and so on. In other words, in this context, corporate organizations should be judged and regulated with emphasis on what they are doing and should be doing for the human individuals respectively involved with them.

In this connection it is not to be overlooked that the privilege of incorporation, which is given by law, is a very useful and valuable one for human individuals who wish to organize in this way to pursue legitimate purposes, whether business, financial, charitable, recreational or whatever they may be. It is important that the legal advantages of incorporation should be readily available, although properly controlled, from both Federal and Provincial Governments.

Prohibition of Discrimination

Finally, though there are areas within which discrimination is proper and just and should be permitted, there are

other areas in which it should be prohibited. The Universal Declaration of the United Nations and other similar charters recognize that justice requires a country's legal system to provide for proper discriminations as well as essential equalities among human individuals and groups. But such charters go further on the subject. They list certain criteria that should *not* be the basis of legal discriminations—criteria which, if used for such a purpose are a denial of justice. A sufficient example is that provided by Article 2 of the Universal Declaration:

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

But even this provision has to be read subject to the need for such proper protective, and beneficial discriminations as are inevitable and necessary.

We turn now to the third characteristic of defined standards for human rights powers, freedoms, duties and responsibilities: the logical truth that they are subject to alternative classifications or characterizations.

ALTERNATIVE WAYS OF CLASSIFYING PROPOSITIONS ESTABLISHING HUMAN RIGHTS AND FREEDOMS

Classification as a logical procedure is simply the arrangement into distinct classes of an undifferentiated mass of data, by criteria for classification, that takes account of various attributes that recur and are inherent in the things concerned. As Dr. Martin Wolff has said:

“Classification may be compared with the mathematical process of placing a factor common to several numbers outside the bracket.”²⁶

It is a sort of process of labelling groups of things for some purpose or other.

²⁶Wolff, *Private International Law*, (1945), 148.

Accordingly, standards concerning human rights and freedoms may be grouped or classified in different ways by singling out a characteristic or combination of characteristics that some of them have in common. For instance, we have already distinguished between human rights and human freedoms. Rights, like the right to vote, are precisely defined, given and protected by the law. But freedoms, like freedom of expression, are in a different relation to the legal system. Their content is defined only in a residual sense by the law (what is not forbidden is permitted) and their legal protection rests mainly upon the general state of peace and order maintained by the legal system. This distinction and classification has an important bearing on how best to safeguard these human entitlements and is important when one is considering what the safeguards should be.

Another classification involves the relation of the individual to the state. Rights and freedoms are distinguished as negative and positive rights and freedoms. Professor Wilbur Bowker has described this distinction in this way:

"In speaking of basic rights and freedoms we think of the individual in relation to the state. He may claim that the state should leave him alone and not interfere with him in certain activities—he demands liberty or freedom. Again, he may claim the assistance of the state in obtaining for him fair treatment from a branch of government or from an individual. He insists on the state securing to him his 'rights'. These freedoms and rights may be called basic, inherent, natural, human or fundamental; and the claim to them may be based on religion, philosophy, tradition or on current concepts of fairness."²⁷

With this classification we were much concerned in Report Number 1.

Dean Walter Tarnopolsky has adopted Mr. Justice Laskin's more elaborate classification of rights and freedoms, and this has also been used in the Federal White Paper entitled *A Canadian Charter of Human Rights*. Dean

²⁷Bowker, *Basic Rights and Freedoms: What Are They?* 37 C.B.R. 43, 43. (1959).

Tarnopolsky's description of these distinctions is found in his treatise on *The Canadian Bill of Rights*.

"It will readily be seen that there are many kinds of civil liberties. Before they can be discussed in any detail, therefore, it is necessary to sub-divide and classify them. There are almost as many classifications as there are writers on the subject, but here the one put forth by Professor Bora Laskin has been adopted. He lists them as follows: *political liberties*—traditionally including freedoms of association, assembly, utterance, press or other communications media, conscience, and religion; *economic liberties*—the right to own property, and the right not to be deprived thereof without due compensation, freedom of contract, the right to withhold one's labour etc.; *legal liberties*—freedom from arbitrary arrest, right to a fair hearing, protection of an independent judiciary, access to counsel, etc.; *egalitarian liberties* or human rights—right to employment, to accommodation, to education, and so on, without discrimination on the basis of race, colour, sex, creed, or economic circumstance."²⁸

Classification problems in relation to the proposed Canadian Bill of Rights will be discussed later. Meanwhile, two general points should be made.

First, no matter how one classifies propositions concerning human rights and freedoms, the logical and philosophical truths concerning their complex nature discussed earlier remain valid. Changing the groupings and their labels does not alter the complex relations of the general to the particular or the problems of overlap and conflict of principles that have been explained.

Secondly, classifications do have significance and purpose. When the Federal White Paper²⁹ speaks of a "Constitutional Bill of Rights", it means "constitutional" in a special sense. It means that the particular rights and freedoms thus designated are considered so important and basic that appropriate normative propositions expressing them should be given the authoritative status of superior constitutional law throughout Canada, that is, that they should be subject to change only by the extraordinary process of constitutional amendment,

²⁸Tarnopolsky, *The Canadian Bill of Rights*, 3.

²⁹February, 1968.

not by ordinary statute in the Parliament of Canada or the Legislatures of the Provinces. In effect this means that judges are given supremacy in determining their meaning and application.

So, this classification by the persons making it tells us that *they* consider the rights and freedoms thus included to be of such great importance that the most appropriate method of safeguarding them is to express them in a specially entrenched part of the constitution. Thus, the judgment that these rights are "constitutional" gives us the conclusions of the classifiers but omits their reasons.

In other words, simply to label political, legal and linguistic rights and freedoms as "constitutional", in this special sense of the word "constitutional", does not in itself prove the case as to their importance relative to other rights and freedoms, like economic and welfare rights, nor does it prove the case as to the most appropriate institutional methods of securing acceptance and compliance by the people.

No doubt the political, legal and linguistic rights and freedoms characterized as "constitutional" in this special sense are of very great importance, though it seems strange that a right basic to the democratic process, the right to vote, has been omitted from the political rights.

One may concede the importance of these rights and freedoms and yet differ from the classifiers who call them "constitutional" about the conclusion that special entrenchment is the surest way, or even a desirable way, to secure the best level of acceptance and compliance by the population as a whole.

Everyone is in favour of the best that can be done to secure basic human rights and freedoms, but the public interest requires hard-headed, rigorous investigation and analysis of just what is the best method. Mistakes as to method will cause good intentions to miscarry. This has been clearly demonstrated in the United States. Oversimplification is easy and dangerous.

In succeeding Chapters we shall discuss and assess the issues that arise out of different available methods to attain the desired ends.

CHAPTER 104

Political and Legal Forms Establishing Human Rights and Freedoms

THE NEED FOR AUTHORITATIVE PROCESSES

AMONG other things we considered in Subsection 1 of this Section, as a matter related to content, problems concerning abstract propositions about what human conduct ought to be at critical points in the total process of social life. We saw that, within limits, there are frequently competing versions, values, analogies and alternatives about such abstract propositions at all workable levels of particularity or generality. This would not be so if all men were possessed of infinite knowledge. If that were true each would perceive the requirements of the one perfect system of social order from the most abstract to the most particular and would be persuaded by his personal powers of perfect reason to comply completely. There would be no competing alternatives and no need for a system of authority. But we do not live in such an ideal society.

Notwithstanding that our critical rules of social conduct are often tentative, incomplete in scope and only partially effective, we must make laws and we must apply them. It follows that there must be authoritative processes for making the best choices we can from time to time between the alternatives reason, research and conscience disclose, even though human capacities and qualities are imperfect. The choices

made between the alternatives become binding on all members of the society when persons exercising authority have spoken.

Who Has the Last Word?

In other words, the need for constitutions and legal systems basically arises out of the exigencies of the imperfections in human nature. There is stark social necessity for operative decisions creating standards to govern at critical points in human relations and for measures to secure compliance with them. Any advanced constitution must provide for the official persons who are to exercise the authority of the organized community and to speak the last word on critical issues until circumstances warrant its reconsideration. This last word, when spoken, defines the principle for action that is to be implemented for the type of issue in hand. If the last word is not spoken at some point, after proper consideration has been given to competing alternatives and interests, the essential order of society based on law will dissolve in endless debate and procrastination or in civil war.

This primary constitutional necessity is manifested in one way by the chief operating rule of our courts of justice, that normally they follow precedent when sufficiently similar cases recur. The same need for decisions that are to prevail may be seen in the principle that our parliamentary statutes (federal or provincial) are final or supreme in the realm of law-making, except for the very few things that are embodied in superior constitutional law in the special sense explained earlier, that is, in the sense that the power to make changes in these very few respects is reserved for extraordinary voting or consent requirements (special entrenchment).

Professor Hans Kelsen has given us a sophisticated and correct picture of the need for constitutional law and the legal system generally to settle the functions of decision-making. He considers the constitution of a state to be a complete system of consistent and progressively more specific rules defining which person or group is entitled to speak the last word on a given type of issue, and the procedural steps that must be followed. These rules settle nothing substantive

about what reasons are to guide the decisions, but, in the purely procedural sense of constitutional regularity, we do get a complete and closed system of propositions of authority for the making of legitimate or socially binding decisions. This is a poor but necessary substitute for the lack of full rational and moral consensus on the one true, ideal and complete set of substantive principles and rules of justice, an ideal that is always in considerable measure beyond human reach for the public ordering of human relations. Accordingly, the need to fall back on a complete system of authoritative deciding procedures is clear, and, as we have said earlier, arises from imperfections in human capacities for complete moral and social perception.¹

Nevertheless, to win and hold the support of the people of a society by serving human well-being, these authoritative constitutional or legal processes need to provide for resort to the best that man can accomplish in reasonable thought, social research and moral insight as the basis for official decisions, however imperfect these powers of reason and insight may be from time to time. In a democratic society, this is a fundamental element of what we call "The Rule of Law". This is the essential blending of reason, moral sensitivity and authority that makes possible a relatively tolerant and open society.

We wish here to place particular emphasis on the position we take with respect to Austin's theory of authority. He was wrong in his view that only formal authority and procedure were legal or constitutional elements, and that reason and moral sensitivity were outside as non-legal influences only. On the contrary, history has proven that reason and moral sensitivity are primary and integral parts of constitutional law and the legal system generally—indeed in a liberal society they are the foundation on which the Rule of Law rests. The experience in the United States with respect to the Eighteenth Amendment to the Constitution prohibiting the sale of intoxicating liquors forcibly demonstrated this. In the last analysis they account for the effectiveness of authoritative

¹See *Canadian Jurisprudence: The Civil Law and Common Law in Canada* edited by E. McWhinney, *The Common Law System in Canada* by W. R. Lederman, 34 and especially 66-70.

deciding procedures. Sufficient willing public support for the country's system of social order is forthcoming if substantive laws have real merit and relevance to social need. This they are likely to have if the procedural rules for primary law-making are fair and effective in the sense explained in Subsection 1, in the passages quoted from Professors Goodhart and Fuller about the significance of the right to vote and the representative character of the primary legislative bodies.

Likewise effective administrative resources and fair rules of procedure are essential for the process of particularizing general substantive laws as we proceed through the various stages of official decision-making. They render them more specific until rights and duties are defined in all their detail apt for application to one individual on the real-life facts of *his* situation.

Professor Hans Kelsen is famous for his development of this view of constitutional and legal process. He has said:

"Statutes and customary laws are, so to speak, only semi-manufactured products which are finished only through the judicial decision and its execution. The process through which law constantly creates itself anew goes from the general and abstract to the individual and concrete. It is a process of steadily increasing individualization and concretization."²

Professor Kelsen's intermediate example of those engaged in the refining and creative process of particularization is the judges, but they are not the only holders of public offices engaged in this process. There are also ministers, permanent civil servants, members of tribunals exercising statutory powers and local government bodies. In Report Number 1 we have given many examples in dealing with the rights of the citizen in relation to official persons in Ontario under provincial law in certain matters.

An important general point is: throughout the whole of the ongoing process of official decision-making and conflict-resolution we have been discussing, substance and procedure are constantly interacting. Good statutory definitions of substantive rights and duties result from fair and effective procedures in the enactment of statutes by representative parliamentary bodies.

²Kelsen, *General Theory of Law and State*, 135.

But, as Goodhart has emphasized, such legislatures are themselves made and re-made periodically through the basic procedural right of citizens to vote in selecting the members of parliament. This means that such legislatures by their nature pay homage to the substantive ideal that the adult members of a society as mature human individuals, must be consulted. This implies faith that they will in general respond positively to appeals to reason—appeals to reason that ultimately take the form of general laws and particular legal decisions in accordance with those laws. We are not speaking here just of the issues or propaganda of a particular election. The emphasis is on the long-run acceptability of the content of constitutional law and the legal system generally, as a matter of reason and justice in both substance and procedure in the eyes of the persons whose actual circumstances bring them within the terms of the laws in some respects critical for those persons. It is this voluntary approval, or at least acceptance, of law by most of the people most of the time that legitimates constitutional law and the legal system generally, and permits us to distinguish legitimate change from revolutionary change.

From the point of view of Smith who is facing a charge of careless driving or Brown who is claiming unemployment insurance benefits or Jones who is applying for a taxi licence, the legal system of decision-making must be complete and in good operating order throughout the whole process from the governing parliamentary statute, the regulations made under the statute, and the disposition of the specific charge, claim or application by the judge, permanent official or appointed tribunal exercising the statutory power of making an authoritative decision in the matter. As recommended in Report Number 1, it is essential in most cases that there be an appropriate right of appeal or review open for a person adversely affected by the first specific decision.

Summary

To sum up, the particularization process consists of both the making and application of laws, substantive and procedural. It involves qualitative concepts of what is fair or just. It authoritatively blends substance and procedure, reason and

form, throughout from parliament to the disposition of the charge, claim or application of Smith, Brown or Jones. The point to be emphasized here is that, from the point of view of Smith or Brown or Jones, a measure of injustice can enter at any level in the processes of particularization. If it enters at any stage Smith or Brown or Jones will suffer injustice. This fact shows the need for systematic detail, complete down to the level of the individual and the specifics of his everyday life and plans. The concern for this need has been the hallmark of our inherited British legal and constitutional tradition. It formed the basis of most of our recommendations in Report Number 1.

POWERS TO MAKE AND APPLY LAWS: THE TOTAL PROCESS

We made many recommendations in our first Report for the improvement of the whole process of administering justice through the improvement of primary and subordinate provincial legislation, not only in terms of general principles but also in terms of intermediate and final details, both procedural and substantive. We discussed in that Report the main functions involved in first formulating general laws and then refining and particularizing them according to appropriate procedures.³ The common theme running through the classification of these functions is the extent of the power that an official person or group of persons may exercise in making or applying laws. We distinguish the following functions:

- Constitutional Amending Power
- Primary Legislative Power
- Subordinate Legislative Power
- Judicial Power
- Administrative Power
- Executive Power (in the old and narrow sense of the word "ministerial")

We have already discussed the nature of constitutional amending power in the sense of special entrenchment, and

³See the General Introduction and Section 1 of Part I of Report Number 1.

we shall return to it later. In Canada, with a few exceptions, primary power to make law by passing statutes rests with the democratically elected Parliament of Canada and the legislatures of the respective provinces. The only reservation concerns special constitutional entrenchment, e.g., respecting certain language rights and free trade within the country.⁴ Subordinate legislative power is conferred by statute on persons or bodies outside Parliament or the legislature. This may be a Minister of the Crown, the Cabinet, appointed persons or bodies or local governments. Administrative and judicial powers are more difficult to define and distinguish, but as a matter of main emphasis this can be done. We set out in Report Number 1 a distinction sufficient for purposes of this Report. For convenience we repeat it in part here.

“ ‘Administrative’ and ‘Judicial’ Powers.

Later in the Report we develop different principles that are applicable to the exercise of administrative powers and judicial powers of decision. The distinction is a difficult one. As we have seen, no clearcut and mutually exclusive distinction can be drawn between judicial power and legislative power. Judicial power requires that decisions be based in many instances on policy. Administrative power, to make decisions that constitute specific legislation, may not require wide policy considerations. We use the following terminology.

A power is ‘administrative’ if, in the making of the decision, considerations are matters of policy. The power may be conferred on a board or commission or official such as the Registrar with power to grant licences under the Private Investigators and Security Guards Act, to which we have already referred. It is in the sense of a specific legislative power to make decisions that we use the expression ‘administrative power’.

A power is primarily ‘judicial’ where the decision is to be arrived at in accordance with governing rules of law; in their application policy enters in only to the limited extent already discussed in connection with the exercise of judicial power. This type of decision will be referred to as a judicial decision.

In using these terms with these meanings it must be emphasized that no clearcut and mutually exclusive distinction exists between administrative and judicial powers.”⁵

⁴See sections 133 and 121 of the *B.N.A. Act*, 1867.

⁵p. 28, *supra*.

The earlier discussion of judicial power referred to was as follows:

"Theoretical judicial power in the sense we have discussed does not exist in a pure state in an actual legal system. A person exercising an adjudicative function under law must often go beyond a merely declaratory action and exercise some choice or discretion on grounds of policy in making his decision, notwithstanding that it is his duty to decide according to law.

There are at least two main reasons for this. Unlike the rules of the hypothetical system we have discussed, the rules of an actual legal system are never at any one time exhaustively stated so as to cover all present and future situations of fact and their legal consequences. When facts arise that are not precisely covered by the rules that have been established, existing rules have to be adapted or new rules have to be formulated. In either case a decision is required on grounds of policy as to what the adaptation or the new rules should be.

Even where rules purport to be completely expressed as, for example, in a statute, the imperfections of language as a means of communication often result in obscurity or ambiguity in the application of the rules to particular facts. In such instances a court applying the statute is required to give a precise meaning to the language for the purpose of applying it to those facts. In the process of interpretation, which we discuss in a moment, the judge must often base his decision in part at least upon policy considerations.

Since policy is the badge of legislative power, the courts to this extent exercise legislative power coupled with their purely judicial power. No mutually exclusive distinction between legislative and judicial power can be drawn in our legal system."⁶

There is however a minor executive power where virtually nothing is left to discretion: a certain well-defined and easily ascertainable set of circumstances have arisen, and the law is clear that a certain official must in these circumstances act in a particular way. He is, in effect, an instrument or automaton following precise orders. It is the final act of implementing a decision made under the law concerning the claim of, or the charge against, a citizen, e.g., the execution of a writ of execution or a warrant of committal.

⁶p. 22-3 *supra*.

The progression from greater to lesser degrees and types of powers to make laws and apply them that characterize the process we have been discussing is a continuous process of the blending of reason and authority. The primary power is that of the representative democratic legislature. It is limited only by the constitutional powers conferred on the legislature. This is variously described as a "political", "legislative" or "policy" discretion. Then follow the lesser but still often quite wide powers that may be described as "administrative" or "judicial" in the senses just explained. Finally, one comes to the enforcement or implementation of legal decisions when they have been formulated in detail, where the enforcement officer has precise instructions and no discretion.

At some point in this progression from the exercise of greater to lesser powers, one passes from law-making to law-applying. This is a relative distinction, and clear enough in many cases, certainly at the extremes, but, there is a considerable twilight zone between law-making and law-applying.

For example, an amendment to the British North America Act in 1940 gave to the Federal Parliament legislative power concerning unemployment insurance.⁷ Parliament, under the guidance of the Government of the day, then had to determine that there was to be a system of unemployment insurance, how it was to be funded, who was obliged to pay into it, what classes of persons were to be covered (or not covered), what the main administrative resources and operating procedures were to be.⁸ An Unemployment Insurance Commission of appointed persons was set up with subordinate legislative powers to refine and develop rules to effectuate the main statutory provisions. Insurance officers were provided for, who would make the first decisions (under the Act and the regulations) on the specific claims of individuals. Then an appeal procedure was provided whereby a disappointed claimant could appeal from an insurance officer's decision to a Board of Referees, and, in some cases, there might be a further appeal to an official called an "Umpire". The insurance officer, the referees and the umpire all are

⁷B.N.A. Act s.91 as amended by 3 & 4 Geo. VI, c.36, s.1, adding item 2A.

⁸The Unemployment Insurance Act, Can. 1955, c.50.

called upon to decide subject to the full detail of the Act and the regulations, as these came down to them from Parliament and the Commission. If the decision should be in favour of the applicant, then the appropriate office employees would see that the required cheques were issued periodically.

It is clear from this illustration and what we have said if constitutional law and the legal system generally are to be effective in defining, protecting and providing for human rights and freedoms all the operating detail and all the functionaries are necessary, as well as the definition of rather abstract but appropriate general principles.

Against this background, we shall discuss the special place or virtue, if any, of a "Bill of Rights" in this total process. The typical "Bill of Rights" is a selective collection of succinct and highly abstract statements of certain human rights and freedoms, in either procedural or substantive terms. In literary style it may be elegant and even inspiring, like some of the great texts of the Bible. It usually occupies but few pages.

It is useful to set out here two typical examples as we shall refer to their terms in later discussion. The First Amendment of the Constitution of the United States reads:

ARTICLE I (1791)

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The second example is sections 1 and 2 of Part 1 of the Canadian Bill of Rights, an ordinary statute of the Parliament of Canada.

PART I BILL OF RIGHTS

"1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

- (b) the right of the individual to equality before the law and the protection of the law;
- (c) freedom of religion;
- (d) freedom of speech;
- (e) freedom of assembly and association; and
- (f) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to:

- (a) authorize or effect the arbitrary detention, imprisonment or exile of any person;
- (b) impose or authorize the imposition of cruel and unusual treatment or punishment;
- (c) deprive a person who has been arrested or detained
 - (i) of the right to be informed promptly of the reason for his arrest or detention,
 - (ii) of the right to retain and instruct counsel without delay, or
 - (iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;
- (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards;
- (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
- (f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or
- (g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted".⁹

⁹Can. 1960, c.44.

We have already discussed the value and limitations of such general propositions, substantive or procedural, as a matter of rational content.¹⁰

THE FORMS OF AUTHORITATIVE STATUS

We now consider the alternative forms of authoritative status with which such brief and general catalogues of rights may be invested by constitutional law and the legal system generally.

Fundamental Customary Law of the Constitution

An example would be the representative and democratic character of primary legislative bodies—one of Sir Arthur Goodhart's first principles of the British Constitution.¹¹

The Rules of Procedure of the House of Commons

"The procedure of the House of Commons of Canada may be found in several places: in the constitution, the Canadian statutes, the less binding rules of the House, custom and tradition, and the Speakers' rulings. Not all of these sources are of equal importance, but one has been built on the other until the whole of the present procedure has been developed."¹²

The House of Commons has power to regulate its own proceedings, and does so from time to time by a simple majority vote on motion, which is all that is necessary to establish or amend "Standing Orders of the House of Commons."¹³

Conventions of the Constitution

The most familiar examples of these are the conventions of Cabinet Government. Sir Ivor Jennings includes under this head the rules coming out of agreements at Imperial Con-

¹⁰See Chapter 103.

¹¹See Subsection 1, *supra*.

¹²Dawson, *Procedure in The Canadian House of Commons*, 6.

¹³*Ibid.*, 8. 15.

ferences about the independence of the British Dominions (the rules defining "Dominion Status", to use the old phrase).¹⁴

These were later declared and refined in the Statute of Westminster of 1931.¹⁵ But that statute expressly purported to be declaratory of a fundamental constitutional position already established by earlier official practice, precedent and agreement among political leaders of the Commonwealth. Federal-Provincial agreements in Canada, at least when formally arrived at in Federal-Provincial conferences, may have the same status.

The Common Law

As a matter of legal history, even before the rise of Parliament as an active law-making body, the judges of England were declaring, standardizing and applying the varying customary laws of the English people—a process in the course of which they really made a vast amount of law, and moreover made it "common" to the whole of England. A large part of the private law in the "Common Law" provinces of Canada is still as the judges shaped it and made it. The producer's liability in the case of *Donoghue v. Stevenson*,¹⁶ is one example. Another example in the field of public law is the principle that the official actions of Ministers of the Crown or permanent officials must find their justification in a specific legal grant of powers so to act, e.g., see *Roncarelli v. Duplessis*,¹⁷ already referred to.

Ordinary Statutes of Federal or Provincial Parliaments

The passing of a statute by a simple majority vote, in accordance with the rules of parliamentary procedure, is the normal and formal law-making act of parliamentary bodies. This is beyond question the most flexible, precise, and regularly available form of primary law-making in use in this

¹⁴Jennings, *The Law and the Constitution*, (5th Ed.) Chapter III.

¹⁵22-23 George V, c.4.

¹⁶See pp. 1503 ff., *supra*.

¹⁷[1959] S.C.R. 121.

country today. The Canadian Bill of Rights is a good example of the use of the ordinary statute in the field of human rights legislation.

Superior Constitutional Law (Special Entrenchment)

DISTRIBUTION OF LEGISLATIVE POWERS

In a federal country like Canada, the distribution of primary law-making power by categories or subjects, between the Federal Parliament on the one hand and the provincial legislatures on the other, as in Sections 91 and 92 of the British North America Act is a special entrenchment. At present these lists can only be changed by the following extraordinary procedure established not by the express terms of the B.N.A. Act but by official practice and convention. First, there is prior consultation and agreement with all the Provincial Governments. Usually an executive consent from the respective Provincial Premiers or Cabinets has been regarded as enough. The Federal Parliament must then approve, by a joint resolution of the House of Commons and Senate, an address to the British Government. The British Government must then introduce and secure passage of a statute through both Houses of Parliament containing the terms requested. The part played by the British Government and Parliament may now be purely formal, but on the other hand unanimous consent of the Provinces may be very difficult to secure.¹⁸

ENTRENCHMENT OF BASIC RIGHTS, LIBERTIES AND FREEDOMS

In addition to the distribution of legislative powers, in a federal constitution like any other constitution, general propositions concerning fundamental human rights and freedoms may be specially entrenched. The United States has such a specially entrenched "Bill of Rights" in the first few amendments of the Constitution, and in the Fourteenth Amendment, added after the Civil War. Amendment now requires a two-thirds majority in both Houses of the Congress, followed by

¹⁸See *The Amendment of The Constitution of Canada*, Honourable Guy Favreau, Minister of Justice, a White Paper of the Government of Canada, 1965, Chapter II.

the concurrence of three-quarters of the States given by the State Legislatures or by special State Constitutional Conventions. These majorities and consents have been difficult to obtain. In over one hundred and fifty years there have been about twenty-five amendments. In fact the first ten amendments should really be considered as being part of the original process of making the constitution.

Propositions essentially the same in content (or identical in content) may enjoy a different authoritative status in different countries or provinces. While the American Bill of Rights is specially entrenched in the Constitution, the Canadian Bill of Rights (in many respects to the same effect) is given authoritative status by a statute of the Parliament of Canada. We shall consider later which method is to be preferred.

AUTHORITATIVE INTERPRETATION

All propositions found in constitutional law or in a legal system generally require authoritative interpretation and fact-finding. The reason for this has been fully discussed already. A given standard, rule or principle is only relevant and operative if the facts it contemplates by its terms exist or have existed. Hence the need is for some person, officially authorized, to construe the terms and determine whether relevant facts exist as alleged. The authoritative declaration that follows this determination may in itself be enough to secure compliance by the persons concerned, or it may be necessary to resort to some means of enforcement. We shall discuss means of enforcement later. In the meantime, we consider the six forms of authoritative status in relation to the process of interpretation and fact-finding. Who speaks the last word on these matters?

In the first place, only the "Common Law" (in the special sense mentioned), ordinary statutes and specially entrenched constitutional law are subject to authoritative interpretation and relevant fact-finding in the regular courts. The rules of parliamentary procedure under our constitution are outside the jurisdiction of the courts. Speakers' rulings or majority votes not only make the rules of parliamentary procedure, but interpret them in relation to relevant facts.

As for the important conventions of the constitution, like the rules of cabinet government, or the first principle of customary law establishing the democratic and representative character of our parliaments themselves, the only means for final interpretation seems to be that given by Dr. J. A. Corry concerning the British Constitution:

"It has already been stated that the power of Parliament to amend the constitution has been qualified by the convention that requires Parliament to have a mandate from the electorate for making any fundamental constitutional change. This convention is a very recent one resting almost entirely on the practice of the last forty years. But it gets its real authority from an inner logic. If Parliament were to use its undoubted power to make any law whatsoever to force through unpopular and drastic changes in the constitution, it would be soundly punished by the electorate at the first opportunity. Thus it is the part of wisdom for Parliament to refer all proposals for drastic change to the electorate at a general election. Like all constitutional changes resting on custom, its limits are hard to define."¹⁹

It will be recalled that Sir Arthur Goodhart, in a passage already quoted said: "It is true that at a time of great emergency Parliament is capable of continuing its own life from year to year, but if it attempted to do so indefinitely in the time of peace we should all recognize that the Constitution had been destroyed." So, if political leaders were to attempt to subvert basic customary principles of the constitution by misinterpretation or fraudulent fact-finding, they would be called to account by the electorate. Such a situation could also end in civil war or revolution. This would also be true of the United States Constitution, even though there is an extraordinary constitution-amending procedure and judicial review of ordinary statutes in relation to superior constitutional law. Some substantive things are more basic than extraordinary voting majorities, governmental consents or court rulings. Both the United States and Britain have had civil wars.

In any event, legitimate interpretation and fact-finding in the realm of fundamental rules resting on basic customary law

¹⁹Corry, *Democratic Government and Politics*, 2nd Ed. p. 111.

is in the hands of those holding the principal offices of government, subject to an appeal to the electorate, as Dr. Corry specifies in his theory of the mandate. Also, the published opinions of jurisprudential and constitutional scholars no doubt have a powerful persuasive value in the proper expression and interpretation of fundamental custom and convention.

So far as the Common Law is concerned, the traditional superior courts are most important. The published reasons of the judges for their decisions give the rules of the Common Law authoritative expression, refinement and application to particular persons and circumstances. Also, as we have seen, the standards laid down by the judges, according to their terms, reach into the future to govern other sufficiently similar cases by the operation of the doctrine of judicial precedent. Finally, in the authoritative interpretation of the texts of statutes, codes or specially entrenched constitutional provisions, the written and published opinions of the judges are of the greatest importance. When such texts are subject to final interpretation and application by the traditional courts, they are said to be fully justiciable. In this regard, much critical development and refinement of statutory or constitutional words is authoritatively in the hands of the judges.

If the statutory or constitutional words concerned are very abstract or general, then the judges have a very wide policy-making discretion in the circumstances. In this respect the implications of a specially entrenched constitutional "Bill of Rights" or even a statutory one, are far-reaching and will be later discussed. The real issue is whether appointed officials, however great their autonomy, integrity and learning, should have as much policy-making discretion as superior court judges in fact are given when the constitutional or statutory statements are very brief, succinct and abstract.

In any event, not all statutory or constitutional texts are in the hands of the judges of the traditional courts for interpretation and application. As we endeavoured to make clear in Report Number 1, some of these statutory powers (whether "judicial" or "administrative" as there defined) are vested in appointed persons or tribunals, other than the traditional county or superior courts. We took the view that in these cases

rights of appeal should be provided to a minister or to the Cabinet if the power is "administrative", as we used the term, while a right of appeal should be to one of the traditional courts if the power is "judicial". In the former case a wide policy-making discretion is involved in the statutory words, in the latter the statutory words give more precise guidance about legislative policy.²⁰

Statutory Directive Principles as Aids to Interpretation

In the realm of the specially entrenched constitutional text, the non-justiciable general principle may be found in the form of what is known as a directive principle for ordinary legislative action. For example, the British North America Act in section 92 (10) (c) provides that the power of the Parliament of Canada to make laws extends to:

"Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces."

Whether a "Work" is to be deemed "for the general Advantage of Canada" is a matter of substantive discretion to be determined by Parliament in an ordinary federal statute. If the statute is sufficiently precise in what it declares, the declaration is conclusive and is not subject to judicial review.²¹ Another example is to be found in the *Report of the Royal Commission on Bilingualism and Biculturalism*, in Book I, where a new section 93A is recommended for the British North America Act in the following terms:

"Every province shall establish and maintain elementary and secondary schools in which English is the sole or main language of instruction, and elementary and secondary schools in which French is the sole or main language of instruction, in bilingual districts and other appropriate areas *under conditions to be determined by provincial law*; but nothing in this section shall be deemed to prohibit schools in which English

²⁰See for instance pp. 54-5, and pp. 233-35.

²¹The authorities are collected and analysed by Mr. Justice Bora Laskin in his *Canadian Constitutional Law*, (third Ed.), 504-09.

and French have equal importance as languages of instruction, or schools in which instruction may be given in some other language."²²

Law-making discretion here is in the hands of the provinces, and the over-riding method of exercising this discretion is by a statute of the provincial legislature. The wording of these constitutional provisions makes it clear that the vital principal policy-making is by voting in the appropriate parliament, not by judicial review of whether the parliamentary statutes have done the right thing in the light of the provisions of superior constitutional law relevant. No doubt though, in accepting such statutes and interpreting them, the courts would construe them favourably to the general policy expressed in the directive principle.

The use of so-called directive principles as rules in aid of interpretation of ordinary statutes is a very useful way of introducing such general principles into the legal particularization process without conflicting with the normal authority of legislative bodies to make the main policy decisions by ordinary statute. An example will be found in the Broadcasting Act of the Parliament of Canada,²³ passed in 1968. In section 15, the Broadcasting Act provides as follows:

"Subject to this Act and the *Radio Act* and any directions to the Commission issued from time to time by the Governor in Council under the authority of this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 2 of this Act."

Section 2 contains the general policy decisions of the Federal Parliament in the following terms:

"2. It is hereby declared that:

(a) broadcasting undertakings in Canada make use of radio frequencies that are public property and such undertakings constitute a single system, herein referred to as the Canadian broadcasting system, comprising public and private elements;

²²*Report of the Royal Commission on Bilingualism and Biculturalism*, Book I, (General Introduction, Official Languages), 134. (Italics added.)

²³Can. 1967-8, c.25.

(b) the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;

(c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;

(d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources;

(e) all Canadians are entitled to broadcasting service in English and French, as public funds become available;

(f) there should be provided, through a corporation established by Parliament for the purpose, a national broadcasting service that is predominantly Canadian in content and character;

(g) the national broadcasting service should

(i) be a balanced service of information, enlightenment and entertainment for people of different ages, interests and tastes covering the whole range of programming in fair proportion,

(ii) be extended to all parts of Canada, as public funds become available,

(iii) be in English and French, serving the special needs of geographic regions, and actively contributing to the flow and exchange of cultural and regional information and entertainment, and

(iv) contribute to the development of national unity and provide for a continuing expression of Canadian identity;

(h) where any conflict arises between the objectives of the national broadcasting service and the interests of the private element of the Canadian broadcasting system, it shall be resolved in the public interest but paramount consideration shall be given to the objectives of the national broadcasting service;

(i) facilities should be provided within the Canadian broadcasting system for educational broadcasting; and

(j) the regulation and supervision of the Canadian broadcasting system should be flexible and readily adaptable to scientific and technical advances; . . .”

The general and substantive policy propositions about broadcasting (here called directive principles) are in this example included as an operative section, about one and a half pages in length, while the whole Act runs to thirty-five pages.

The National Transportation Act²⁴ of 1967 affords another example. In section 1 it contains, in the space of one page, some very general substantive propositions about the nature of national policy concerning different modes of transportation and the relation between them and the national economy. The whole statute occupies seventy-six pages.

A court will not declare parts of the Broadcasting Act or the National Transportation Act beyond the powers of Parliament, and thus void, simply because the judge might think later detailed sections of either Act to be inconsistent with the earlier section of the statute setting forth in very brief and general terms Parliament's policy on broadcasting or transportation. Nevertheless, as indicated earlier, though non-justiciable in this primary sense, such directive principles are “justiciable” in a secondary or incidental sense and this is of real importance. We have seen that, after Parliament has spoken, there remain lesser but often very considerable elements of discretion, at the several stages of determining the meaning of a statutory scheme, that are necessary to accomplish application to the specific cases and circumstances finally deemed relevant. Such directive principles would then operate as presumptions of interpretation and limitations guiding not only the judges of the traditional courts, but also the other officials and tribunals responsible for administrative or judicial discretions in the processes of individualizing statutory law, processes that have been described and explained earlier. Such principles would also be available to the superior courts in aid of their historic function of reviewing the validity of

²⁴Can. 1966-67, c.69.

the exercise of powers by other official persons or bodies subordinate to Parliament itself.

General directive principles that are non-justiciable in this primary sense, though influential in interpretation at secondary levels of law-making or law-applying, may be expressed in any one of several authoritative forms, independently of a particular statutory scheme. For our purposes, what may be an important example of this is section 2 of the Canadian Bill of Rights.²⁵ It provides in part that:

"Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared . . ."

Does this mean that the propositions expressing "the rights or freedoms herein recognized and declared" are presumptions of interpretation only, concerning other federal statutes, or that they are overriding in substance? In the former event it may be argued that the Canadian Bill of Rights has no effect if the words of the other federal statute in question are in themselves clear and unambiguous, so that no presumptive aids to interpretation are needed. In the latter event, it may be argued that the words of the Canadian Bill of Rights, if of over-riding effect, would repeal by necessary implication anything inconsistent in an *earlier* federal statute. But it is doubtful if, on any view of its meaning, the Canadian Bill of Rights could effectively limit the provisions of a *future* federal statute, if Parliament was explicit and unambiguous in that later statute. In other words, it is probable that the reference forward of the Canadian Bill of Rights could only be at the level of presumptions of interpretation. We will return to issues concerning the Canadian Bill of Rights later. Suffice it to say, that so far as its effect on *other* statutes of the Parliament of Canada is concerned, whether those other statutes are earlier or later in time, the Canadian Bill of Rights at least would seem to provide aids to interpretation.

To recapitulate, a general directive principle of state

²⁵Can. 1960, c.44.

policy may appear as superior constitutional law, but be so worded that it is of persuasive effect only, for the primary legislative body that has power to act by ordinary statute. In other words these ordinary statutes are non-justiciable, that is, not subject to judicial review for validity or invalidity as being contrary to such a directive principle. The persuasive power of such a principle is no doubt reinforced by its status as superior constitutional law, but if it is disregarded or flouted by ordinary statute, the only appeal is to make an issue of this for a vote in the parliamentary body involved or in a general election. This brings us back to Dr. Corry's theory of the electoral mandate, which is really appropriate only for a few of the most fundamental of principles for which there is a deep and widespread support in the population. Only such principles should be expressed as superior constitutional law. No doubt there is more latitude as a matter of constitutional propriety about expressing generally applicable principles in an ordinary statute devoted only to them, like the Canadian Bill of Rights, but there remain the difficulties about judicial review of other statutes of all kinds in relation to the expressed principles as we have already noted.

One of the best constitutional uses of the general principle has perhaps been found in the illustrations given from the Broadcasting Act and the National Transportation Act to which we have just referred. The general principles are stated briefly and expressed in general language. But they have the authority of statutory form. Their value lies in that they provide authoritative and effective general presumptions in aid of the interpretation of other more detailed sections of the statute itself. They also provide authoritative and effective general guide-lines applicable to the lesser law-making and law-applying discretions that are *subsequent* to the primary statute itself in the necessary processes of particularizing the statute law discussed earlier. In the result, such *lesser* law-making and law-applying discretions are subject to judicial review for validity or invalidity in relation to the general statutory directive principles.

In The United Nations Declaration of Human Rights,

the element of reliance on persuasive directive principles is very strong. The operative words of proclamation for the thirty articles are as follows:

“The General Assembly Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”²⁸

Teaching, education and progressive measures are emphasized. There are no limits on the forms “progressive measures” might take, and obviously a considerable variety of authoritative forms is contemplated, forms that are expected to vary in different countries according to their respective types of government and their historically developed political, constitutional and cultural traditions.

SUMMARY

It is useful now to summarize briefly the analysis we have made heretofore in this Subsection. This will lay the foundation for a discussion of the matter of securing compliance with standards laid down.

The typical “Bill of Rights” is a very selective collection of brief and highly abstract statements of certain human rights and freedoms, in either procedural or substantive terms, or both. There is a necessity for particularizing and individualizing these (or any other) general propositions through several stages to render them meaningful as law in action for the every-day purposes of ordinary people. This is not a self-executing process. It must be an authoritative process in which substance, procedure, reason and form are blended in decision-making and conflict-resolution by responsible official persons.

²⁸The Universal Declaration is reprinted in the White Paper of the Government of Canada, cited earlier, entitled “A Canadian Charter of Human Rights”.

There must be official authoritative fact-finding and interpretation of rules at the several levels of increasing particularization, including appeal procedures where appropriate, but all leading without undue delay to *final* decisions concerning powers, rights and freedoms for specific individuals or groups of individuals. There must be time for due process and there must also be a time for decision. A government in office must make choices and get things done; the constitution must provide fair and legitimate ways of doing this. The words of Chief Justice Coke are as true now as they were in the Seventeenth Century: "If the judicial matters of record should be drawn in question, by partial and sinister supposals and averments of offenders, or any on their behalf, there will never be an end of a cause, but controversies will be infinite."²⁷

²⁷Coke, quoted by Sir William Holdsworth, *A History of English Law*, Vol. VI, 237 (1922).

CHAPTER 105

Techniques of Persuasion and Enforcement

PERSUASION and enforcement are more difficult areas of rights' legislation than the definition of rights. Once the meaning of the law has been officially and clearly declared in its applicability to the powers, rights and freedoms of particular persons or groups enforcement begins. The first and most important point is that the authoritative final declaration made in specific terms will be accepted generally and voluntarily by the parties concerned without the imposition of sanctions. The more carefully fair processes of decision have been observed, the more likely is voluntary compliance with the resulting decision. Under a liberal and democratic constitution, the level of voluntary compliance should be high. But, what if there is not voluntary compliance, or what if there are efforts to circumvent or subvert compliance indirectly?

Since we are discussing human rights, the range of considerations here calls first for a classification of those rights in terms functionally appropriate to persuasion, enforcement and compliance. We have seen that general principles expressing human rights and expectations overlap and conflict in many ways. There are two areas of conflict, corresponding in the main to the distinction between private and public law which we have discussed earlier.

- (1) Private persons or groups may come into conflict in the realm of social ideas with other private persons or groups, or be disappointed in what they conceive they may legitimately expect of other private persons or groups.

(2) Private persons or groups may come into conflict in the realm of social ideas with some arm of the government, in one of its many manifestations, or be disappointed in what they conceive to be their legitimate expectations about something they think the government should provide or protect for them.

CONFLICT BETWEEN PRIVATE PERSONS AND OTHER PRIVATE PERSONS OR GROUPS

In the areas of social life where private persons or groups find themselves arrayed against one another the experience of the Ontario Human Rights Commission is most useful and instructive when considering what can be accomplished by educative and persuasive processes without the imposition of sanctions.¹ The Commission deals with particular issues of discrimination relating to fair opportunities to secure employment and residential or commercial accommodation, together with fair access to public services and places. With respect to these the Ontario Human Rights Code, which is an ordinary statute of the Legislative Assembly, is an outstanding piece of legislation. Dr. Daniel G. Hill, the Director of the Commission has put it this way:

“Human rights legislation in Ontario is based on recognition that a person is not free, if, by reason only of his particular race, colour, creed or age he is denied employment or access to services and accommodation which are normally available to the public.”²

Respecting the matter of enforcement and conciliation Dr. Hill said:

“How is the legislation enforced and what are our practices? The Code provides that every formal complaint must be in writing on a prescribed form. Thus, unverified telephone conversations and second-hand reports do not in themselves constitute a formal complaint. The complainant must sign a statement of charges and be interviewed by Commission staff.

¹We shall deal fully with the Ontario Human Rights Commission and the adequacy of the safeguards for the rights of the individual provided under the Act (Ont. 1961-62, c.93 as amended) in our next Report.

²Daniel G. Hill, *Protecting Human Rights in Ontario, 1793-1968*, 8 Human Relations, 8-9 (No. 16, March, 1968).

Loose and unprofessional investigatory procedures are unfair to all parties and tend to breed resentment and contempt for the law. On the other hand, rigidity, a sometime concomitant of formality, must also be diligently avoided, so that a balanced procedure is achieved. Every effort is made to conciliate the complaint and to obtain a settlement. The Commission's policy in this area is to keep formal correspondence to a minimum and to place strong reliance upon personal contact and discussion. The conciliation process is highly flexible and, as a policy, the investigator concentrates rather less on the issue of legal guilt than on the issue of effectuating a satisfactory settlement. This procedure is predicated on the thesis that confrontation and accusation tend to reinforce the discriminatory attitude. For example, if the accused is asked whether he has committed a discriminatory act, almost invariably, he will deny it. Once having denied it, his assumption of this pose of self-respect will compel him to resist conciliation overtures. A settlement then would be perceived as an admission of guilt.

If conciliation fails, the commission may recommend that a person outside of government be appointed to act as a Board of Inquiry to investigate and report on the complaint. This step is a significant departure from the practice of the majority of Human Rights Commissions in the United States where the investigative and adjudicative functions are frequently combined within the one agency, with an internal separation of responsibility. In my view, separation of function on this basis sacrifices considerable fluidity of action necessary for effectual compromise and settlement. The staff person investigating the case is, in effect, relegated to the function of gathering evidence and, not unnaturally, encounters considerable opposition and hostility. Our staff are empowered to obtain an 'on-the-spot' settlement if possible, which is especially useful if, during the process of investigation, both parties seem co-operative and desirous of an agreement. Essentially, the whole matter of conciliating human rights complaints requires a judicious blending of the 'velvet glove' and 'iron hand'. When I say that we have a settlement-oriented approach, let me be very specific in terms of what the practical elements of a settlement entail.

If the complaint involves a housing situation, the accused will be urged to act in good faith and offer the complainant an apartment or house or room or whatever; if it is a job, he might offer the individual immediate employment or assure him that within a given period of time, employment will be forthcoming; if he has denied an individual a haircut, he is

asked to cut the person's hair immediately; if he has denied resort accommodation, he will be required to offer it during the current or subsequent season.

Returning, briefly, to the Board of Inquiry let me explain how the civil liberties of the accused are protected at this level. Board chairmen are usually drawn from the ranks of county court judges or deans of law schools. These Boards are empowered to summon witnesses, order production of documents and take evidence on oath in a manner that best suits the nature of the inquiry. The hearing is generally conducted in a local court house, where the Commission, through its counsel, adduces the relevant evidence and the respondent is afforded the opportunity of reply. . . .

Frequently the Board acts as a super-conciliator. But, failing settlement, it can assume a more formal posture by advising the Commission that the case should be dismissed or, if convinced that discrimination did in fact take place, it may advise the Minister to issue an order requiring the respondent to cease the complained-of practice or face prosecution. The Board may alternatively choose to by-pass the order and recommend direct prosecution to the Minister. If the latter course is chosen, the whole matter is inquired into *de novo* by a magistrate applying the quasi-criminal standards of evidence and proof, thus affording to the accused the full protection of yet another branch of the law.

On conviction, the accused is liable, in the case of an individual, to a fine of not more than \$100 and, if a corporation or trade union, to a fine of not more than \$500. Because of the minimal nature of the fine levied, some individuals might at first, choose court proceedings rather than relinquish their discriminatory policy and treat the fine as merely a 'license to discriminate'. In order to discourage this type of attitude, the Minister is empowered to seek an injunction against such continuing contravention. In effect, the Ontario system, while providing for a speedy and flexible method of resolution, doubly insulates the accused from any bureaucratic evil by giving him the opportunity of making his answer and defense to the allegations at two separate and distinct stages and before two separate and unrelated independent tribunals."³

Experience has shown that conciliation procedure appears to have been most successful. Since 1962, the Commission has received about 8,000 complaints. Some 1,600 of these were such as required formal investigation. Of these only fifty led

³*Ibid.*

to a public board of inquiry under the provisions of the Act and merely two of them to a prosecution.⁴

Three points have been put forward as important in the administration of this Act. First, the initial private investigation and conciliation, which disposes of nearly all of the cases, is carried out by public officials at public expense. No part of the expense is borne by the complainant or by the person against whom the complaint has been made. In the rare cases where a public inquiry is held or a prosecution commenced, the case for the complainant is presented by the officers of the Commission or in the case of a prosecution by a Crown Attorney. Should the person against whom a complaint has been made be in financial need, which is an unlikely event, legal aid would be available to him under the Ontario legal aid scheme.

Secondly, the procedure by private official "conciliation" is relatively quick and informal. The conciliation officer does not bargain with the person alleged to have discriminated against the complainant. The officer points out the law and the facts which he thinks amount to a violation of the Code and seeks to procure a voluntary compliance that will give the complainant a practical remedy. For instance, the conciliation officer will not say to a landlord of a twenty-unit apartment building—"Set aside two of your apartments for coloured people and we will leave you alone respecting the other eighteen." Rather, he will stress the principle that there must not be discrimination because of colour in the leasing of any of the landlord's vacant apartments at any time. The persuasive powers of the conciliator are no doubt vitally assisted by the fact that sanctions are available if compliance with the Code is not obtained. The sanctions may well be, as Dr. Hill has indicated, the iron hand in the velvet glove.

Thirdly, the Commission carries out a very extensive and important educational programme in co-ordination with and in support of its other activities. This programme recognizes that compliance with standards of fairness to others in these

⁴Figures given by the Honourable Arthur Wishart, Attorney-General of Ontario, to the Constitutional Conference of First Ministers, Ottawa, February 11, 1969. See p. 414 of the Unrevised Hansard.

areas must primarily be a matter of belief by most of the people in the justice of the standards.

As part of this educational programme the Commission publishes a monthly magazine entitled *Human Relations* that now has a circulation of about 150,000. A wide variety of informational pamphlets are distributed. Over 1,000,000 pieces of Commission literature and 50,000 letters have been distributed to key persons involved in business, labour and other walks of life during a five-year period (1962-67).⁵ Where the government or any of its branches is operating as an employer, a landlord or a provider of public services it must meet the same standards and requirements laid down for private employers, landlords or those who provide public services. The Code is expressly made applicable to "the Crown in right of Ontario and every agency thereof."

CONFLICT BETWEEN PRIVATE PERSONS OR GROUPS AND GOVERNMENT

We now come to the area where private persons or groups find themselves arrayed against or expecting something from an arm of the government. In discussing this area we break the main category down into several sub-classes in order to consider different factors of compliance and enforcement.

There is some similarity between private and public legal relationships but there are also some differences. Private persons or groups may find themselves arrayed against some arm of the government, or expecting something from the government, in ways that are unique to the public law area. Compliance and enforcement here are usually a matter of ensuring the proper discharge of the public and legal powers of law enforcement agencies, ministers of the Crown, administrative tribunals and other official persons. This includes ensuring a proper allocation of public resources, both of money and personnel, often on a very extensive and expensive scale.

The public area we are discussing includes political rights, personal physical security, the regulation of career or business

⁵Daniel G. Hill and E. Marshall Pollock, *Human Rights Legislation in Ontario, "Race" IX The Journal of The Institute of Race Relations*, London 199 (No. 2, 1967).

opportunities, the expropriation of privately-owned land and the provision of minimum personal economic security under certain social programmes for income supplements or pensions.

Included in "political rights" are freedom of expression, freedom of conscience and religion and freedom of assembly and association. These are as Mr. Justice Rand has said "original or natural rights of the person." Nevertheless, as we have explained earlier, they depend on the law for the definition of their scope in a residual sense, and upon the maintenance of a general state of peace and order by government under the law for their very existence and enjoyment as areas of peaceful option and opportunity for the individual.

In any truly democratic country the right or power to vote should be included as a political right. In fact, it is the key stone in the arch of the modern system of political rights in this country. The extent of this right is defined in the appropriate statutes. But all individuals are not given the right to vote. It is a right that is conferred on certain classes of individuals. The person who can bring himself within the terms of the statute may compel the authorities to place his name on the official voters' list and enforce the recognition of his power to mark a secret ballot at the polling booth on election day. This is a right he may enforce through the courts.

Earlier, we referred to the essential nature of "rights to personal physical security and freedom." The existence and enjoyment of these rights by the individual, like all other rights, depend upon the maintenance of a general state of peace and order by the government. We have seen that the safeguarding of personal physical security and freedom requires procedural fairness (due process) in all aspects of the administration of the law and its enforcement. It is essential that a proper balance be maintained between procedural fairness to accused individuals and the necessity for general public peace and order—fairness to the accused and protection of the innocent against predators. The quest for procedural fairness must not be permitted to destroy or take away the right of the vast majority of persons who are law-abiding to enjoy their personal safety and freedom of movement. The maintenance of

this balance demands well-trained, well organized, well-equipped and well-paid police forces. It is essential that they have reasonably effective powers of investigation and arrest if public order is not to be subverted by criminally inclined persons or groups. These groups may be small elements of the population, but their potential for harm is great.

In "career and business opportunities" we include such things as laws controlling the qualifications for various trades, occupations, professions and licensing schemes. The public interest demands proper standards and fair procedures in the administration of such laws. These matters have been fully discussed in Report Number 1.

The "expropriation of privately-owned land for public purposes" is an important area in which the citizen is in frequent conflict with some arm of the government. This matter has been reviewed at length in Report Number 1 and remedial provincial legislation has been passed.

Earlier we noted that the Canadian Bill of Rights of 1960 calls for the "enjoyment of property, and the right not to be deprived thereof except by due process of law." We have discussed the immense complications involved in this apparently simple proposition with illustrative examples from India, Nigeria and Northern Ireland. Some powers of expropriation are necessary for a wide variety of public purposes. A public body may exercise such powers to obtain title to land with compensation. On the other hand, powers akin to expropriation affecting the user of land may be exercised with no compensation; e.g. zoning by-laws.

Finally, as belonging to the public area we have referred to "rights to income supplements from the state to provide minimum personal income security and pension schemes." Reference has been made to the example of unemployment insurance. We have pointed out that these are areas where beneficial discriminations are made between persons and groups of persons and that proper discriminations of this type are instruments of justice. This has been emphasized by Professor Harry W. Jones in the following terms:

"Even more important than the regulatory aspect of the welfare state is its office as the source of new rights—for example,

the expectations created by a comprehensive system of social insurance. I see no reason why the word 'rights', with its unique emotive power, should be deemed inappropriate for these new expectations and preempted for use only in connection with such traditional interests as those in tangible property. For example, studies tell us that the typical middle income American reaches retirement age with a whole bundle of interests and expectations: as homeowner, as small investor, and as social security 'beneficiary'. Of these, his social security retirement benefits are probably his most important resource. Should this, the most significant of his rights, be entitled to a quality of protection inferior to that afforded his other interests? It becomes the task of the rule of law to surround this new 'right' to retirement benefits with protections against arbitrary government action, with substantive and procedural safeguards that are as effective in context as the safeguards enjoyed by traditional rights of property in the best tradition of the older law.

To suggest, as I have, that the reasonable expectations of a social service beneficiary are as meaningful for the rule of law as the interests of an owner of investment securities or real property is in no way to urge a lowering of the standard of protection now extended by law to the more traditional interests. The goal, substantial parity of treatment, can be pursued by levelling up as well as by levelling down. The new expectations progressively brought into existence by the welfare state must be thought of not as privileges to be dispensed unequally or by arbitrary fiat of government officials but as substantial rights in the assertion of which the claimant is entitled to an effective remedy, a fair procedure, and a reasoned decision. Anything short of this leaves one man subject in his essential interests to the arbitrary will of another man who happens to partake of public power; and that kind of unequal and demeaning encounter is repugnant to every sense of the rule of law."⁶

In Report Number 1 we dealt with the reform of procedures in Ontario for persons receiving benefits under the Family Benefits Act of this Province. Enforcement of these rights is simple. Either there is payment or there is not payment to the applicant out of public funds. The official authorization to pay or not to pay should be governed by full and fair procedure in the decision-making process.

⁶Jones, *The Rule of Law and The Welfare State*, 58 Col. L. Rev., 143, 154-55 (1958).

This completes our review of law as a standard-setting system for human conduct—a normative system—in the essential relation it bears to the total social process. We have examined this from the point of view of powers, rights and freedoms secured to human individuals, in some way and to some extent, by the blending of reason, procedure, substance and form in the legal system. We now proceed to discuss the appropriate integration of the various authoritative forms and institutions available, with particular reference to the place a typical “Bill of Human Rights and Freedoms” holds in a country inheriting, as we do in Canada, the British constitutional traditions, comprehending the whole field of primary public law, both at the federal and provincial levels of government.

CHAPTER 106

The Appropriate Blending of Parliamentary and Judicial Supremacy in the Constitution: The Need for Integration and Completeness

WE HAVE discussed the relation of the legal system to human rights and freedoms, and to the inevitable and corresponding limitations, duties and responsibilities. We have shown that the typical “Bill of Rights” must be a very selective collection of highly abstract statements of a few of these rights and freedoms in either procedural or substantive terms.

If there is to be a “Bill of Rights”, two basic questions arise.

- (1) What form should it take? Is an ordinary statute good enough, or should there be some form of special entrenchment?
- (2) Which rights and freedoms should be expressed in such a document and which ones should be left out? We shall state briefly our conclusions and then develop our reasons for them in some detail.

We start out with this conviction: *generally* the ordinary statute passed after full opportunity for debate by a majority in one of our democratic parliamentary bodies, under the leadership of the Cabinet, is the most legitimate, flexible, sophisticated and readily available instrument for the enactment of important legal changes to be found in any modern

state. By important legal change, we mean change at the primary level of general policy-making, to which we have referred earlier. This, which has been true and beneficial in our more slow-moving past, is all the more true and beneficial now when our society is increasingly complex, urbanized, pluralistic in ideals and technologically sophisticated. It is fundamental that since the legal system is itself part of the basic original structure of any organized society it must be susceptible to renovation and reform in response to changing social conditions.

As we have seen, constitutional special entrenchment means, and is intended to mean, something more difficult in procedure than debate and a simple majority in a democratic parliament before legal change can be made in any matters placed under special entrenchment. It means, for instance, that something like a two-thirds or a three-quarters majority is required to change the law in such matters, or, in a federal country like Canada, that the consent of most or all of the Legislatures of the Provinces would be required, along with that of the Parliament of Canada, to enact any changes. Politically these degrees of agreement are very difficult to obtain and they are intended to be difficult to obtain. Indeed frequently they could be practically impossible to obtain. Clearly before constitutional entrenchment can be usefully discussed it is essential that there be firm agreement on how the constitution is to be amended.

The main business of a Government in office is to govern and to that end to get things done. If too many matters are specially entrenched, or the wrong ones are specially entrenched, Governments in office, and the democratic parliaments in which they have ordinary majorities will be frequently frustrated and deadlocked by minority vetoes of one kind or another when the interests of society as a whole demand that they should be able to act. In such case the whole philosophy of the ballot box at elections and the ordinary majority procedure in parliament which is founded on appeal to reason, to the rational nature of man and not to force, is defeated. It is wrong to think of this as simply "the tyranny of the majority".

Where there has been undue special entrenchment, the responsibility to adjust the law to social change is transferred from the Government in office and the responsible parliamentary body to the superior courts. The only way they can discharge this responsibility is by change and development in their interpretation of the meaning of the abstract words and phrases that are typical of specially entrenched laws. In this way some running adjustment may be made of those specially entrenched laws to changing social need, in spite of the deadlock resulting from the political difficulty or impossibility of making the extraordinary legislative procedures for constitutional amendment work.

THE JUDGES AS POLICY MAKERS

We are at once confronted with these questions, which require clear and detailed answers. Do appointed judges have as high a claim to legitimate status for primary policy-making as elected members of Parliament? In any event, are the courts better able to make good primary decisions on social policy than are governments and their respective parliaments under the cabinet system? In the first place, the judgments of the courts depend for effect and acceptance on the historic impartiality and professional prestige of the judiciary. Beyond this, if enforcement measures are necessary, the courts depend on the Government in office and the parliamentary body to which the Government is responsible. Cabinet and Parliament, unlike the judiciary, have at their disposal the powers of the purse and the sword plus the great administrative resources of the civil service generally.

But it is not proper to think in terms of parliamentary bodies and the judiciary as rivals. What we need is a proper integration of their functions, an integration which takes due account of their differing characteristics as institutions. In our earlier analysis we saw that the work of the courts should be in creative co-relation with that of cabinets, and the legislative bodies on which the cabinets respectively depend, as well as permanent officials and other kinds of tribunals. The purpose of this co-relation is to articulate the shared purposes of

society at some meaningful level of generality, and then to individualize or particularize the laws thus generally expressed, for specific persons and circumstances.

Generally, primary policy-making should not be demanded of the courts, though there are one or two exceptions to this—very limited exceptions—to be explained later. Normally, the primary policy-making decisions in formulating laws should rest with the democratically elected parliament. In making this statement we assume the acceptance of the principle of universal adult suffrage for all citizens, with all native-born persons being automatically recognized as citizens and with citizenship for landed immigrants by naturalization being readily available on reasonable terms. We take the position that at the primary level of law-making parliamentary supremacy, as expressed in ordinary statutes, should prevail.

As we have indicated earlier, there are still areas for essential and important creative decision-making and conflict-resolution by courts, administrative tribunals and senior permanent officials. All must function in an integrated way to refine the general laws of Parliament and to make the legal system complete as an ongoing and living process. *But normally, Parliament, under the leadership of the Cabinet should have the power to overrule the courts.* It must have the last word at the primary level of this complete process. We do not think that it is consistent with a true concept of democracy for a court of appointed judges to be able to make a law with far-reaching effects touching the lives of everyone in the country with no power in Parliament to alter it. In the last analysis in such case the power of final decision may rest on one man casting the deciding vote in the court of last resort.

For reasons that we shall develop later we have come to the conclusion that a "Bill of Rights" for the Province is desirable but that there should be no special entrenchment. If the Bill is not entrenched it may be wider in its scope and more useful in the protection of the rights of the individual. In any case, if it is entrenched it should go no further than a definition and entrenchment of the rights of the individual that are themselves the foundation of parliamentary democracy. There may be some advantage to be gained from such

entrenchment but as we have said, before any entrenchment can be considered it is essential to decide what kind of entrenchment there should be and the means by which constitutional amendments are to be made.

In a country under a federal constitution, as a matter of original first principles, primary law-making powers are divided by lists of subjects between the federal or central parliament on the one hand and the respective provincial parliaments on the other. The propositions expressing this distribution must be specially entrenched, with all that implies for amendment and judicial interpretation. The various parliaments of the federation enjoy supremacy at the level of primary social policy-making according to the subjects of potential law-making respectively listed for them. As a matter of authoritative interpretation, the superior courts must have the last word about what the rather general phrases distributing the powers between the respective parliaments mean from time to time, and if these words and phrases are to be changed, it must be necessary to invoke an extraordinary constitutional amending procedure in order to do it.

The parliaments of a federation cannot be permitted unilateral control over the interpretation of the original distribution of primary legislative powers itself, nor unilateral control over amendment by ordinary statute. If they possessed either power, they could and would destroy the federal constitution. The superior courts, in particular the Supreme Court of Canada, must be accorded the last word in fulfilling the interpretative responsibility, even though to do so confers certain primary law-making power upon it, because of the highly abstract nature of many of the terms used to distribute powers of the respective parliaments. The final determination of social policy in a federal country is greatly influenced by these judicial decisions as to what powers and responsibilities rest with the federal rather than the provincial level of government, or vice versa.

Our particular concern here is with the typical "Bill of Rights", and the relative functions of Parliament and the courts in relation to such a document. Our general position has been stated. We now develop the reasons for it.

As we have indicated, in the main special entrenchment for a "Bill of Rights" means that, on the items of primary social policy-making selected for entrenchment, supremacy is given to the appointed judiciary rather than to the elected parliaments. Our position is that, if there is to be some entrenchment, the content of such a "Bill" should be strictly limited, and moreover expressed in carefully qualified terms.

RIGHTS ESSENTIAL TO PARLIAMENTARY DEMOCRACY

Earlier we have shown that the "Bill of Rights" theme is potentially ubiquitous—it leads everywhere. All laws directly or indirectly deal in standards of human conduct, whether official or private, so that the whole legal system consists of definitions of human rights, duties, freedoms, powers and so on. This we attempted to make clear in Report Number 1. You cannot specially entrench the whole legal system—constitutionally that would be nonsense. So, if you are to have special entrenchment at all, you must apply limitations of some kind. This means that a classification system appropriate for the purpose must be used. We have discussed the process of classifying laws and we saw the multiple possibilities that exist logically in this respect. The key word in what we have just said then is—"appropriate". In other words, our task now is to classify propositions concerning human rights and freedoms by a criterion that selects only those deserving the peculiar authoritative legal form of special entrenchment if entrenchment there is to be. We have stated what we consider this criterion to be—*the rights of the individual that are themselves the foundation of parliamentary democracy, as we have inherited it and as we know it*. In essence this acknowledges that the essential right of the individual is to be a part of the democratic process and to live under a democratic system of government. When we have given this special status to the foundations of parliamentary democracy itself, it follows that from that point on we should place our trust for primary law-making in the enactment of ordinary statutes by our parliamentary bodies. What then are the essential rights of the human individual by this test?

We first list these rights as we see them in general language without regard to the precise literary forms they might take, and then comment on certain institutional requisites essential to their enjoyment.

- (1) *The right of every person to freedom of conscience and religion.*
- (2) *The right of every person to freedom of thought, expression and communication.*
- (3) *The right of every person to freedom of assembly and association.*
- (4) *The right of every person to security of his physical person and freedom of movement.*
- (5) *The right of every adult citizen to vote, to be a candidate for election to elective public office, and to fair opportunity for appointment to appointive public office on the basis of proper personal qualifications.*
- (6) *The right of every person to fair, effective and authoritative procedures, in accordance with principles of natural justice, for the determination of his rights and obligations under the law, and his liability to imprisonment or other penalty.*
- (7) *The right to have the ordinary courts presided over by an independent judiciary.*

In these seven propositions, we have approached the fundamentals of government from the point of view of the human individual. Involved in these propositions there are certain institutional requisites essential to their enjoyment or which at least have proven to be historically effective, for our system of government. The most important of these institutional requisites may now be briefly stated:

- (1) *That the only source and definition of power for elected or appointed official persons is the public or constitutional law itself, whether this takes the authoritative form of specially entrenched rules, ordinary parliamentary statutes, judicial precedent or basic established custom.*
- (2) *Since Canada is a federal country with an original distribution of primary law-making powers by subjects between*

the Federal Parliament on the one hand and the Provincial Parliaments on the other, there must be an extraordinary amending procedure (special entrenchment) controlling the original distribution of powers and Provincial boundaries.

(3) That those who govern Canada at the primary legislative level in the Federal Parliament or the Provincial Parliaments do so in a representative capacity by virtue of their election as members of their respective parliamentary bodies, and are subject to change in periodic and free elections. Their usual method of law-making is, after due deliberation, to pass statutes by ordinary majorities under the leadership of their respective cabinets.

(4) That the final authoritative interpretation of judicial precedents, and, at critical points, the final authoritative interpretation of specially entrenched laws and ordinary statutes, rests with a well qualified, impartial and independent judiciary enjoying appointment to permanent tenure in office during good behaviour.

Concerning the traditional courts, particularly the superior courts, we have seen that, in the Canadian context at least, they must have the last word respecting interpretation of the final distribution of primary legislative powers itself. But we have also seen that, in some circumstances, the courts are excluded from the function of interpretation. We have seen examples of specially entrenched general principles of policy intended as guide-lines only for legislative action by parliamentary bodies. Also, an ordinary statute may, by its own terms entrust interpretation and application of its provisions to Ministers of the Crown, permanent officials or appointed tribunals other than the traditional courts. Indeed this is frequently done. We have dealt at length with the propriety of this in Report Number 1. We have seen that the traditional courts are not considered to be appropriate institutions for many of the tasks of decision-making and interpretation necessarily embodied in our statutes. Nevertheless, the point was made that, in all cases, there should be a right of appeal open to a politically responsible minister or to one of the traditional courts, depending on whether it was a policy decision or a

judicial decision. At all times, it should be remembered that the historic jurisdiction of the superior courts includes keeping a watch on the outside limits of the powers granted by the law to ministers, officials, tribunals and lesser courts. In Report Number 1 we considered this jurisdiction to be essential and we made recommendations to simplify the procedures whereby the citizen may invoke the power of a superior court to review the decision of a minister, official or tribunal as to whether he has acted within the powers conferred on him by law. The sort of test of the limits of a minister's powers that was invoked in the case of *Roncarelli v. Duplessis*¹ should always be open to a person who alleges he is a victim of the purported but unauthorized exercise of official power. In this sense, the superior courts are the primary guardians of the rule of law as expressed in the first institutional requisite we have given earlier. But it is not the duty of the superior courts in the exercise of this power of review to take over areas of substantive decision-making that the parliament concerned intended to place exclusively *within* the powers of a particular minister, official or tribunal. However, many statutes are of a nature that calls for interpretation and application to individuals in all aspects by full judicial methods. The Criminal Code is an obvious example and there are many others. Hence as stated earlier, at certain critical points in the total legal process final interpretation by an impartial and independent judiciary enjoying permanent tenure is essential.

However, in all four institutional requisites, we may appear to be somewhat circulatory to a certain extent. The ordinary and even the special legislative procedures (if any) in the constitution are essential to give effective implementation to the right of the citizen to vote, the right to freedom of thought, expression and communication, the right to freedom of assembly and association and so on. But could these voting procedures by representative persons not be used to abridge or eliminate the individual rights from which they arise? Could not a parliamentary body prolong its own life indefinitely or require a ninety percent majority henceforth to repeal a statute passed by it? Likewise the superior court judges are public

¹[1959] S.C.R. 121.

officers whose offices are created by the constitutional law, yet they have the last word on the meaning of certain vital constitutional laws and on certain statutes. Could they not so interpret the law as to inflate their own powers over social policy-making and to curtail the powers of parliamentary bodies or tribunals, or the rights of some individuals or groups? Who watches the watchman? We think that the only possible answer is that the people must, in the end, as a matter of fundamental custom.

This brings us back to the point made earlier that basic long-enduring beliefs, embodied often only in informal and unwritten custom, are the most fundamental things about a constitution. As Sir Arthur Goodhart said, if Parliament prolonged its own life indefinitely, except in a grave war emergency, we should all recognize that the constitution had been destroyed. Dr. J. A. Corry has put it in his theory of the mandate in this way. On some fundamental matters you just have to fight a general election, and then vote in Parliament to get the answer.

The personal and political rights of the individual we have listed are those which manifest the rational nature of man and which set as the primary goal of politically organized society the full development of his individual personality. This development must in some degree necessarily take place in co-operation with and equality with others, but also the individual should have a reasonably wide area of options to move in directions of development he chooses for himself. This all depends upon deep-running beliefs in the power of reason to make governmental procedures effective, and in the virtues of mutual respect and tolerance.

We are indebted to Dr. J. A. Corry for so clearly making the points we wish to emphasize here, writing on *Ideals of Government*. He says that the commitment to religious toleration was essential to the development of the liberal democratic state, because: "In taking religion out of politics, three assumptions vital to modern democracy were made."

"First, by virtue of their common humanity, men have enough common interests, and can find a sufficient basis of common beliefs, to found a system of order without having to be com-

mitted to dogmatic answers to all the ultimates. Second, the profoundest need of all men is for self-expression (in selfless as well as self-regarding forms) and all the various interests they struggle to defend and promote are means to that end. Third, they can agree to concede to others the claim to personality that they make for themselves on the ground that, given mutual trust and confidence, this is the best way to protect their own most cherished claims and promote their own deepest needs, including their need for fellowship with others of their fellow-men."²

Then, under heading of *The Belief in Rationality*, he continues as follows:

"In other words, the democratic ideal assumes that man is a rational being, capable of finding principles of action and subordinating private desires to those principles. This assumption is of basic importance. *If men will not 'listen to reason,' democracy cannot be an enduring form of government.* The conflicting aims and interests of numerous individuals cannot be arbitrated and harmonized by discussion and debate unless there are generally accepted rules to decide who wins the debate. The simplest and most obvious of these rules is that the majority carries the day. But the bare principle of majority rule is just as irrational as the proposition that might is right. We choose ballots—and the process of discussion involved therein—rather than bullets because the former makes room for rational procedures. For example, in discussion of rival claims, it is common to ask each claimant what he would expect to get if he were in the other's shoes. This is an appeal to a principle, the principle of equality of treatment for all who stand in the same position.

In a society where there is mutual respect for individual personality, men have some confidence that when the majority is making up its mind, the appeal to principles will not go entirely unheeded. To be more specific, there is some confidence that when a case is shown to rest on erroneous statements of fact, it will be discredited, that when it is shown to conflict with some widely accepted principle, it will be held to be a bad case. On the other hand, there is some confidence that when a case rests on proved facts and accepted principle, it will be given favourable consideration.

Of course, none of us shows full respect for facts and logic all the time. Some men are always immune to reason, and there are times when emotional appeals seem almost to drive

²Corry, *Democratic Government and Politics*, (2nd ed.) 26.

reason from the field. Men are also creatures of feeling and not mere logical machines. But the peaceful interplay of free personalities requires a substantial measure of rationality. *The democratic ideal therefore has to assume that, through effort, men can move from the plane of feeling to the plane of reason, there to talk out their differences and settle them on some basis of principle.*"³

³*Ibid.*, 30-31. (Italics added.)

CHAPTER 107

Entrenchment

ACCEPTING then that the seven individual human rights listed in the preceding Chapter and the four institutional requisites for their enjoyment are essential to a liberal democratic state, the next question to be faced is: when, if ever, should we use a form of special entrenchment and when a form of ordinary parliamentary statute for the authoritative primary definition of a human right or a governmental process, whether it is the rights and processes we have mentioned or other important rights and processes? In other words—which is the better authoritative form for this or that right, this or that process? Special entrenchment may be better for some, ordinary statutes for others, or it may be a matter of no real importance which form is adopted. In any case this can be said with confidence. If most of the people no longer believe in these basic values, no authoritative forms will in the end save democratic rights or procedures. In this sense the form chosen is secondary. But, assuming that most of the people do hold these essential beliefs, what are the real issues as to methods of making and applying the relevant laws?

There is strong evidence that the principal feature of the succinct and very general statements typical of a “Bill of Rights”, such as the basic ones set out in the preceding Chapter, is the rational and persuasive impact of what they say and imply about the ordering of human society rather than the authoritative form they take, that is, as specially entrenched constitutional clauses or as sections in an ordinary parliamentary statute.

The specially entrenched clause really does nothing "special" for the *rational impact* of the proposition concerned. We have to ask, then, whether it might not be better to use the procedurally more flexible form of the ordinary statute. For example, in a specially entrenched clause, the Constitution of the United States asserts that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." After the Civil War this was extended to include laws made by the State Legislatures as well. The Canadian Bill of Rights, an ordinary statute of the Parliament of Canada, states that fundamental freedoms in Canada include "freedom of religion". It is interesting that the Supreme Court of the United States and the Supreme Court of Canada have each upheld the validity of ordinary statutes for the compulsory closing on Sundays of business establishments, reasoning that this was not offensive to "freedom of religion" because the Sunday-closing statutes did not require of any person any positive act of religious observance. Whether one likes this judicial reasoning or not, the differing authoritative status of the two similar statements of religious freedom made no difference to the interpretation of their meaning in the highest courts of the United States and Canada respectively. In very similar social conditions, these very general words seemed to have essentially the same rational and persuasive impact.¹

So far as authoritative forms or techniques are concerned, either a specially entrenched clause or a statutory section is equally a mandate to the courts. If comparisons with the United States and other countries are to be made in order to assist in making decisions about whether Canada or this Province needs a specially entrenched Bill of Rights, then the comparisons should be fully developed. Superficial comparison leads to dangerous oversimplification of matters inherently very complex.

A good example of this sort of comparison may be taken from the Federal White Paper of February, 1968, entitled *A Canadian Charter of Human Rights*.² The text points out,

¹*McGowan v. Maryland* 366 U.S. 420 (1961); *Robertson and Rosetanni v. The Queen* [1963] S.C.R. 651.

²See *A Canadian Charter of Human Rights*, a White Paper of the Federal Government issued in February, 1968, by the then Minister of Justice, p. 24.

among other things, that the Supreme Court of the United States has forbidden the admission in court of evidence illegally obtained by the police against an accused person in criminal cases. This was done by judicial decision based on the specially entrenched Fourth Amendment of the United States Constitution forbidding unreasonable searches and seizures. In Canada (as in Britain) the judge-made law of criminal evidence generally permits the admission of illegally obtained evidence. After referring to the Fourth Amendment of the U.S. Constitution, the Canadian White Paper asserts: "Illegally obtained evidence should be as inadmissible as an illegally obtained confession"; it implies in the context that a specially entrenched prohibitory clause and judicial supremacy in the interpretation of it is the right way to keep out such evidence. The comparison with the American Constitution is not apt. In the first place, unlike the United States "Criminal Law", and "Procedure in Criminal Matters" are federal subjects of legislative jurisdiction in Canada. Evidence in criminal cases is part of criminal procedure, a subject exclusively within the jurisdiction of the Canadian Parliament. The Parliament of Canada controls the law and could quite effectively forbid the admission of illegally obtained evidence in a criminal case by an ordinary statute—an amendment of the Criminal Code of Canada or the Canada Evidence Act. If the issue is as important as the White Paper would suggest one asks the question, why has the Federal Government not moved to deal with it by ordinary statute? It may well be that the elected representatives of the people would not vote for a bill in such wide terms. In any case, under our parliamentary system, the Government of the day can secure the legislation it wants on any subject coming within its exclusive jurisdiction so long as it commands a majority in the House of Commons. If it ceases to do so, it ceases to be the Government. This is not so in the United States. This consideration makes the analogy with the United States a weak one, because of vital differences between the parliamentary and the presidential systems. In the United States on the one hand the President has no assurance of getting the legislation he wants from the Congress, and on the

other hand he has the right of veto subject to being overridden by a two-thirds majority. In addition, criminal law and procedure are in the main State and not Federal subjects of legislative power. There are upwards of fifty sources of criminal law in the United States. Therefore there was a constitutional necessity peculiar to that country for the Supreme Court to take an initiative, if there was to be a national standard concerning the admissibility of evidence in these circumstances. This is not the situation in Canada.

The analysis of such abstract statements in a Bill of Rights made earlier applies in another aspect to this example. One cannot just say "illegally obtained evidence should be excluded". "Illegally obtained evidence" raises difficult problems with many facets, immensely complicated by the new and sophisticated electronic technology. Even without the new complications, is the Canadian and English rule as to illegally obtained evidence always wrong? There are many degrees of illegality. They vary from minor trespass or a trivial defect in a search warrant to violent brutality. In seeking the best protection for the rights of the individual be he accused of crime or a victim of crime, one asks these questions: Is a person accused of violent crime to be allowed to go free because true and relevant evidence that would convict him was obtained through a simple trespass on private property by the investigating police officers or any other person (e.g. discovery of the lethal weapon or the stolen goods)? Are the civil law rights with respect to private property to be elevated above safeguarding the personal safety of law-abiding citizens who have been the victims of violent crime? Most if not all people will agree that confessions given under compulsion should be excluded in a criminal case and that the conception of "voluntary" be strictly construed in favour of the accused. But there agreement ends, and difficult problems arise of balancing the right to personal privacy and the need for adequate law enforcement powers of investigation to protect the right of peaceful citizens to live in peace.³ It is quite clear that these

³We deal further with the experience in the United States with regard to self-incrimination at p. 1586 *infra*. See also Beck, *Electronic Surveillance and The Administration of Criminal Justice*, 46 C.B.R. 643, (1968) for a survey of the issues raised.

problems cannot be satisfactorily solved by abstract and general constitutional statements.

The difficulties raised are sharply illustrated by the relatively new need to resolve the conflict between the right to personal privacy and use by the police of electronic devices in aid of law enforcement. Here the legal need is for a complex, well worked out scheme of compromise that covers in one operation all important issues and implications of the new technology. It is beyond the institutional capacity of a court to devise and impose such a solution. This is typically the sort of problem in social control appropriate for treatment by the ordinary majority process in a democratic representative legislative body. This process can best provide in one operation a sophisticated and flexible statute defining in an integrated way the rights, duties, powers and so on that must be dealt with, and the statute can authorize the administrative personnel, resources and expenditures of public funds necessary to make the scheme work. Furthermore, the statute can be treated in a proper scientific spirit as an experiment in the control of a difficult social problem area, through standard-setting rules. The actual results of the application of the original statute can be carefully observed and assessed, and amendments readily made to it by the legislative body concerned, as experience shows the way to improvement, rather than through the long process of litigation and uncertain judicial interpretation. In Canada, an amendment can be much more simply and effectively made than in the Congress of the United States, because we have the Cabinet system and not the Presidential system. In the Congress of the United States a series of committees has a high degree of control of the legislative process. The various committees sometimes feud with one another and overlap in their jurisdictions. In the parliaments of Canada and the Provinces, the respective cabinets are in a strong position to give unified leadership and take initiatives in response to public opinion.

In the judicial process, typical judicial law-making in response to the need for social change is interstitial. Cases are dealt with when they arise, proceeding gradually from precedent to precedent. In the modern world this is a valuable and

necessary supplement to the primary legislative process; but the judicial system, being interstitial so far as innovation is concerned, assumes that the main rules have been provided by the customs of the people (in older times) or by ordinary statutes (in modern times). Without these there would be no interstices—no gaps to be filled by sensible judicial adjustment and innovation.

The contrast between the flexibility and range of the legislative and the judicial processes is strikingly illustrated in the field of electronic eavesdropping to which we have just referred and which we take as an example. In this field even the Americans have not been satisfied with whatever solutions their Supreme Court could provide by judicial decisions under the specially entrenched Fourth Amendment prohibiting unreasonable searches and seizures, and the extension of that prohibition to the States by the Fourteenth Amendment. In June of 1968, the Congress of the United States deemed it necessary to enact a complicated law to deal with the issues involved. As a matter of federal legislative power, Congress has to justify this legislation in the criminal area under the power it possesses over inter-state commerce. To do this the new law⁴ starts out with a recital of the general Congressional findings of jurisdictional facts and with general statements of the purposes of the law, very much like the directive principles

⁴*Omnibus Crime Control and Safe Streets Act of 1968*, Public Law 90-351, 82 Stat. 197, (1968), Title III, Wiretapping and Electronic Surveillance.

Title III—Wiretapping and Electronic Surveillance Findings

“Sec. 801. On the basis of its own investigations and of published studies, the Congress makes the following findings:

(a) Wire communications are normally conducted through the use of facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications. There has been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, without the consent of any of the parties to such communications. The contents of these communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings, and by persons whose activities affect interstate commerce. The possession, manufacture, distribution, advertising, and use of these devices are facilitated by interstate commerce.

already discussed as parts of the Canadian Broadcasting Act and the Canadian Transportation Act.

The operative sections of the new congressional law are long and involved, though not unnecessarily so. The very complexity of the problems itself dictates this. In a perceptive and penetrating essay on the whole subject, Professor Stanley Beck has summarized the effect of the chief operative sections as follows:

- “1. Any person who intercepts or attempts to intercept any oral or wire communication, except as authorized by the Act, is liable to a fine of \$10,000.00 or five years imprisonment, or both. The same penalties are applicable to anyone who manufactures, advertises, sells or possesses any device that he knows is primarily useful for intercepting oral or wire communications.
2. The Attorney General or any Assistant Attorney General may apply to a federal judge for an order authorizing eaves-dropping where such interception may *provide evidence of* the following crimes:
 - a. Security crimes—treason, espionage, sabotage.
 - b. Murder, kidnapping, robbery and extortion.
 - c. Bribery, obstruction of justice, counterfeiting and bankruptcy fraud.
 - d. Narcotics offences.
 - e. Conspiracy to commit any of the above offences.

(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

(c) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offences and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused.”

3. The application for an order must be particular as to the facts and circumstances relied upon by the applicant, the offence, the place of interception, the type of communication to be intercepted, the identity of the person whose communications are to be intercepted, whether other investigative techniques have been tried and failed, and the time for which the interception is to be maintained.
4. The authorizing judge must be satisfied that there is probable cause for belief that the crime has been committed or is about to be committed, that communications concerning the offence will be obtained, and that normal investigative techniques have been tried and failed or appear unlikely to succeed if tried.
5. The maximum authorization period is thirty days. Extensions may be granted in restricted circumstances. The judge may require that reports be made to him showing what progress has been made under the order. A record of all applications made and orders granted must be kept for ten years.
6. All recordings made pursuant to an order must be returned to the judge and sealed under his orders. The presence of the seal is a prerequisite to the use or disclosure of a recording.
7. Within a period not more than ninety days after an application has been denied, or after the termination of an order, the judge shall cause to be served *on the person named in the application* an inventory that includes notice of the fact of the application and its denial or approval, and whether communications were or were not intercepted. Upon motion, the judge may in his discretion make available to the party concerned or his counsel such portions of the communications as he determines to be in the interests of justice. Ten days notice must be given before any intercepted communication may be used in court.
8. No communication that has been intercepted otherwise than in accordance with the Act, and *no evidence derived therefrom*, may be used in any trial, hearing or other proceeding.
9. Once each year a full report of the number of applications made, and orders granted or denied, must be made by the Attorney General to Congress. The report must contain a summary and analysis of the orders granted, the time periods authorized, the crimes specified, the approximate number of persons whose communications were intercepted, the number of arrests resulting from interceptions, the number of trials and the number of convictions resulting.
10. A civil cause of action is given against any person who intercepts, discloses or uses any intercepted communications

otherwise than in accordance with the Act. An aggrieved person may recover actual damages (not less than \$100.00 per day of violation or \$1,000.00 whichever is higher), punitive damages, and an attorney's fee and costs."⁵

The law also provides for strict control of the manufacture of electronic listening devices and for the establishment of a "National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance". This Commission has a six-year life, and is required to report regularly on technological developments in this field—which are fast-moving—and on the effectiveness of this and other laws directed to imposing controls in this difficult area. This alone demonstrates the superior flexibility of legal innovation and reform by a parliamentary body. It would be quite impractical to create such a commission as part of the judicial processes of the courts, and yet the need for one is scientifically obvious.

Enough has been said to show that there is an intricate problem of compromise in the example we have chosen and it is only an example. In such cases two questions arise: what is the proper compromise solution? *and who should have the last word on what it is to be?* In the United States, Congress has attempted to devise a solution for the balancing of personal rights to privacy with adequate police powers to investigate suspected crime. But, it is constitutionally possible that the nine judges of the Supreme Court, holding office by appointment for life, will decree that parts of this Congressional scheme of law reform are offensive to the specially entrenched Fourth Amendment and are therefore null and void. Thus the nine appointed judges of the Supreme Court can and may over-rule the elected Representatives and Senators in the Congress of the United States.

This is not a problem regarding the distribution of primary law-making powers by subjects between the Congress and the State Legislatures. It is a question of the supremacy of the Court over both the Congress and the State Legislatures

⁵Beck, *Electronic Surveillance and The Administration of Criminal Justice*, 46 C.B.R. 643, 689-91 (1968).

concerning the solution by law of social problems that the Court may decide come within any of the very general propositions in the American Bill of Rights.

In other words, at the level of primary policy decisions and relevant law-making for the control of complex social problem areas, the Supreme Court of the United States, because of the special entrenchment of the American Bill of Rights, has been given a constitutional entitlement superior to that of the democratically elected Congress and the State Legislatures to speak the last word on the substantive content of laws for the United States. It is true that the Supreme Court could be over-ruled by a constitutional amendment, but politically this is almost an impossible process to work successfully since it requires a two-thirds majority in both Houses of the Congress and the concurrence of three-quarters of the fifty States. This means that, with the very rare exception of a constitutional amendment, the Supreme Court has every-day final power over the democratic legislative bodies of the country. The result is that not infrequently the Court has denied the respective legislative bodies the right to pass laws which they have considered to be necessary to advance the social well-being of the people.

We have already referred to the conflict between the Court and the legislatures over minimum wage and hours of labour laws. We have set out in Appendix "A" to this Subsection a digest of the development of judicial decisions of the Supreme Court in its interpretation of the Fifth Amendment to the American constitution which provides for protection against self-incrimination. The relevant words for our purposes are:

" . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself.* . . "

As will be seen upon reading Appendix "A" the Court in interpreting the italicized words, for 75 years considered the constitutional protection to be only a declaration of the common law protection against self-incrimination. However, in 1886 the judges in effect disregarded the words "in any

criminal proceedings" and extended the protection to proceedings civil in form. The expansion of the protection was to continue until 1968. The protection now extends to a witness giving evidence before a grand jury, or in a civil case or on a statutory investigation and to the production of documents and the giving of evidence which might give leads to the discovery of incriminating evidence.

It has been held that although the State could tax gamblers, legislation requiring gamblers to register so that the tax can be collected is invalid and legislation designed to control the traffic in shot-guns and rifles with barrels less than eighteen inches long is unconstitutional on the ground that the requirement to register was a law which would tend to compel the owner of the weapon to disclose that he was engaged in criminal activities.

We are not discussing whether the decisions of the United States' Supreme Court with respect to the Fifth Amendment have been wise decisions or whether the law that has evolved from these decisions is good law or bad law. What we are concerned with is set out in bold relief in the words of Stewart, J. in the *Grosso* and *Marchetti* cases⁶ when he said: "If I were writing upon a clean slate I would agree with the conclusion reached by the Chief Justice in these cases and in *Haynes v. United States* for I am convinced that the Fifth Amendment privilege against compulsory self-incrimination was originally meant to do no more than confer a testimonial privilege upon a witness in a judicial proceeding. (For after all, what the clause says is 'no person . . . shall be compelled in any criminal case to be a witness against himself . . .') But the Court long ago lost sight of that original meaning. In the absence of a fundamental re-examination of our decisions . . . I am compelled to join the opinions and the judgments of the Court."

It is clear what has happened. The Court has exercised wide legislative powers in this field and no legislative body representative of the people has any power to reverse or alter the law as declared by the Court. No matter what the result of the decisions may be the legislatures of the country are impotent to correct error if error exists.

⁶See Appendix "A", p. 1622, *infra*.

The issue for Canadians with respect to the entrenchment of the "Bill of Rights" is clear. The proposals made by the Federal Government in 1968 and 1969 for a Canadian Charter of Human Rights, specially entrenched on the American model, is a proposal that we should adopt the sweeping degree of judicial supremacy that obtains in the United States.

There has been some confusion about what is the true issue raised by these proposals. In the White Papers issued by the Federal Government it was proclaimed that "the rights of the people must precede the rights of governments".⁷ It is said that special entrenchment on the American model would mean effective recognition of this, the implication being that we have neglected "human rights" in Canada and the provinces by the way we do things. There is some implication that if one opposes or doubts the value of special entrenchment one is opposing or doubting "human rights". This is not so. The earlier striking down of maximum hours of work and minimum wage legislation by the Supreme Court, to which we have referred, testifies to this.⁸ Entrenchment does not necessarily give the best assurance of the most effective safeguards for human rights. While it may safeguard the rights of some individuals it may effectively deprive others of any proper safeguards. To say that the "rights of the people must precede the rights of governments" is a colourful figure of speech but in fact it is a dangerous and very misleading figure of speech if taken literally.

We can agree in one sense that the rights of the people must precede the rights of government if the word "government" is used as synonymous with "the corporate state". In Report Number 1 we said: "There is no place in a true democracy for a doctrine of the welfare of the corporate state as distinct from the welfare of the individuals who are its components."⁹ We cannot agree with a philosophy of government that deprives the people of the ultimate right to determine their own social affairs through democratic

⁷*Federalism for the Future*, 8, (1968); *The Constitution and The People of Canada*, 16, (1969).

⁸See also the cases dealt with in "Appendix A" to this Section.

⁹See p. 2, *supra*.

processes and transfers the final power of decision in certain wide areas to appointed officials—the judges.

The whole truth is that wherever you have an orderly society, there you already have law and government. The rights and freedoms of the people are embodied in government under law, and the good society has good government under just laws. The way to improvement is to seek the development of better government under more just laws. As we have endeavoured to show both in Report Number 1 and in this Report this is an exercise in integration—an authoritative process in which substance, procedure, reason and form are all blended in decision-making and conflict-resolution by responsible official persons. To say that “the rights of the people must precede the rights of governments” is to postulate a *false division and priority*, when the truth lies rather in the necessity for *wise and simultaneous integration* of many factors as the road to improvement.

To repeat then, the true issue raised by the proposals for a specially entrenched Charter of Human Rights is an issue of method. Is the American system of judicial supremacy, at the primary level of social policy decisions and law-making, preferable to the principle that has dominated in Canada and the Provinces until now, namely that parliamentary supremacy and not judicial supremacy prevails at the primary level of social policy decisions and law-making?

We have seen how widely a final court may range with the last word on the meaning of general and abstract phrases about “self-incrimination,” “due process of law” and “equal protection of the laws”, just to mention three of those that occur in the American Bill of Rights and which, among other items, are being urged upon Canadians for special entrenchment. The issue is plain. The question is not confined to whether appointed judges or elected parliamentarians can think up *better* solutions for complex social issues at the primary level. The issue involves—which institution, the high court or parliament, *has the better title* to speak finally for the community at the primary level of social policy decisions and their expression in appropriate laws?

A representative democratic parliament as an institution

and the members of parliament as individuals are legitimated by periodic elections in a sense that is superior to the constitutional status that any appointed persons acquire, by virtue of appointment. This includes the judiciary as an institution and the judges as individual holders of public office, as well as all other appointed persons except the Ministers of the Crown themselves, who make up the Cabinet. With respect to the Ministers, election is the real process underlying their selection; appointment to the Cabinet is the result of having fought and won an election in the constituencies, individually and collectively. As the constitutional authorities cited earlier have pointed out, periodic elections and the parliamentary process of law-making are appeals to reason—to the rational nature of man. The highest recognition of the equality and final worth of human individuals in the realm of politics and law is the right of each to vote on the basis of universal adult suffrage, in periodic and free elections, where the constituencies are so arranged by population that one man's vote is substantially as great in influence as another's. It is this which gives the parliamentarians the constitutional right and title to the *last word* at the level of primary social policy decisions and their expression in laws. This is the highest entitlement that can be conferred by constitutional arrangements which seek to set in first place the primacy of the human individual and the rational side of his nature. The right to vote was not mentioned at all in the Federal proposals for a Charter of Human Rights in 1968, though universal suffrage for the Federal Parliament is specified in the proposals of 1969 concerning the structure of Federal institutions.

We therefore prefer parliamentary supremacy, subject to what we shall later say in favour of the seven personal rights and freedoms and the four institutional requisites essential for their enjoyment, which we listed in the preceding Chapter. These may be considered to be fundamental to the security of the democratic process. They express the rational and ideal basis of representative parliamentary democracy itself. But as we shall point out later, any expression of these rights in general terms must be carefully qualified.

Special entrenchment, limited to the items indicated,

may be considered only as a possibility if the amending process that is eventually adopted for Canada is a flexible one. If the amending process is a rigid one then special entrenchment of a Bill of Rights should not be considered. It can always be given adequate authoritative expression in ordinary statutory form.

In considering the entrenchment method versus the definition of human rights by ordinary statute we must keep clearly in mind the age of rapid social change that we live in—change that is hard to foresee. Behind the accelerating rate of change lie the new technologies that have come from a great explosion of new knowledge in the natural sciences. A similar and related explosion is going on in the social sciences, of which the advance of learning and knowledge in politics and law are a part. There is both need and pressure for government to know more and do more about more things. In other words, conditions of modern society are throwing up sweeping new areas of responsibility—vast new problem areas—that call for sophisticated measures of governmental control, measures that are often very expensive. Electronic eavesdropping in relation to privacy has already been discussed in some detail. Another example is the pollution of air, land and water, or in civil libertarian terms, the “right” to clean air, land and water. A further one concerns the quality of life in cities, since it is said that by 1980, eighty percent of all Canadians will live in cities. There are all the problems of urban planning and renewal, and the necessary reforms in local government. Then there is the whole question of serious poverty in the midst of affluence, upon which the Economic Council of Canada has recently reported. The twenty percent of Canadians who are at or below the poverty line in income are more concerned with breaking out of the vicious circle of repetitive poverty in which they find themselves than they are with some of the standard rhetoric of a general Bill of Rights. Also, education has become enormously important and enormously expensive. Then too, there is the power of modern means of communication, radio, television and the great metropolitan newspapers. These threaten to become great centres of private power or monopoly, in some cases

tending unduly to control thought. In all these areas, governments are called upon to make decisions of all sorts involving extensive law reform and often the provision of expensive resources co-ordinated with legal controls of various kinds. In these circumstances, governments dare not lock themselves into a constitutional straitjacket, where repeated deadlock is likely or even possible in the solution of grave social problems. This is precisely what has happened in the past in the United States and what we would do if we followed the American example of sweeping judicial supremacy for life-appointed judges over the democratic legislative body that contains the elected representatives of the people.

Aside from the fact that appointed judges do not have the superior constitutional title that goes with periodic election, judicial procedure focuses on individual persons and their conflicts, that is on the specific end of the operation of the complete legal system. Their need and incentive to generalize solutions for social problems is limited and interstitial. The courts are important but the nature of the judicial institution is simply such that it is designed to play its part within a framework of primary policy decisions and relevant laws made by a parliamentary body. A court is not designed to be an uncontrolled policy-making body.

The modern democratic parliament on the British model, which we have in Canada at the Federal level and in the Provinces, not only has the superior constitutional title for primacy in major decisions of social policy, but it has the matching institutional design and procedure. It does not focus on specific individual conflicts but on social problems in a general way. Royal commissions and parliamentary committees can conduct hearings and investigations where a great variety of interested parties and experts may make their reasoned submissions. The whole expertise of the civil service is directly available. Then, after due deliberation, the Government can stand behind a statutory solution that deals with law reform and control of social problems with as much generality and particularity as the social need for regulation and the use of public resources seems to call for. The fact is that the well-drafted statute passed in a democratic parliament under the

cabinet system with full debate and under scrutiny of freely expressed public opinion is the most flexible and sophisticated form of law-making available under a constitutional system that puts human individual rights first.

There remains to be considered the contention that special entrenchment of a Charter of Human Rights for Canada is necessary to bring Canada into harmony with international declarations of this character, some of which are being offered as conventions to which Canada might adhere as binding international obligations at both the federal and provincial levels.

The position in the Council of Europe, in particular, is held up as an example, providing as it does for a European Court with compulsory jurisdiction accepted now by about a dozen countries. But, in reality, this is simply the judicial supremacy issue we have just considered. The fact is that the international legal order is partial only, in the sense that it speaks in these matters just at the level of vague generalities. Moreover, the international legal order is institutionally poverty-stricken. It took hundreds of years to develop in England the modern democratic parliamentary institutions that we have inherited in Canada and its provinces. They have no equivalent in the international sphere. Neither the Council of Europe, nor the United Nations, nor any other international organization has anything similar. It is much easier to constitute courts than it is to develop representative democratic parliamentary bodies on the one-man, one-vote principle. So, naturally, international lawyers tend to turn to courts and to exaggerate their virtues and capacities in the field of the full realization of human rights.

One may regret very much that the international legal order is not in better shape, but there is no point in behaving in Canada, at either the federal or provincial level, as if we, too, were institutionally poverty-stricken. We can do better—much better, because we have available democratic parliaments under cabinet leadership with the extraordinary flexibility of the ordinary statute ready at hand, as the means of giving leadership to legal change whereby human rights can be effectively stated, protected and fulfilled down to the

last specific decision for a particular person. We have the means of running a complete legal system, through all the necessary stages explained earlier. None of these things exists internationally. This is why international conventions are confined to vague generalities, with some very marginal international judicial jurisdiction or international commission activity as partial implementing measures. A liberal and democratic state like Canada and the same may be said of this province, has much to teach the international legal order about the proper place of courts in these matters in the modern world. It is not the other way around, as many would have us believe. The United Nations Declaration of Human Rights and Fundamental Freedoms is a noble document, albeit in very general terms, but its main impact is in the sphere of the rational appeal and the educational value of what it says and what it implies.

CHAPTER 108

Conclusions

OUR firm conclusion is that the Province of Ontario ought not to consider agreeing to any entrenchment of a national Bill of Rights binding the legislative power of the Province in those fields committed to it until a satisfactory amending process has been determined and agreed upon.

Assuming that a satisfactory amending process can be agreed upon we now consider whether the seven rights and freedoms which we believe to be the foundation of the democratic process of government should be entrenched in the Canadian Constitution. For convenience we repeat them here.

(1) *The right of every person to freedom of conscience and religion.*

(2) *The right of every person to freedom of thought, expression and communication.*

(3) *The right of every person to freedom of assembly and association.*

(4) *The right of every person to security of his physical person and freedom of movement.*

(5) *The right of every adult citizen to vote, to be a candidate for election to elective public office, and to fair opportunity for appointment to appointive public office on the basis of proper personal qualifications.*

(6) *The right of every person to fair, effective and authoritative procedures, in accordance with principles of natural justice, for the determination of his rights and obligations*

under the law, and his liability to imprisonment or other penalty.

(7) The right to have the ordinary courts presided over by an independent judiciary.

Even the entrenchment of these rights would require considerable and difficult qualification, with resulting difficulty of interpretation. No doubt "one-man one-vote" is the essential basis of the democratic process in this country. But the right to vote is extremely difficult to define in constitutional terms. The principle is expressed in the federal and provincial electoral statutes but as we pointed out in Report Number 1 under the Ontario legislation the right to vote is denied to "a patient in a mental hospital". While under the federal legislation it is denied to "every person who is restrained of his liberty of movement . . . by reason of mental disease." We pointed out that many of the patients in mental hospitals are there as voluntary patients, free to leave if they wish. One asks the question, should the qualification be "a patient in a mental hospital" or "necessarily confined to a mental hospital by reason of mental disease," or be subject to some other test?¹ Also ideas with respect to voting age may vary from province to province. The point is that it is most difficult to define in constitutional terms how the simple democratic principle of "one-man one-vote" should be expressed.

The task of framing language to express the qualifications to be applied to the other six rights and freedoms may in some cases be easier and in some cases more difficult. It would be most difficult to entrench within a rigid constitutional framework the right to effective and authoritative procedures in accordance with the principles of natural justice for the determination of the rights of the individual and his obligations under the law. In fact, it would be most dangerous to do so, lest the attempt at a constitutional codification of these rights should curtail the common law rights now existing and the expansion of the concept of natural justice.

In Report Number 1 we recommended the enactment of a Statutory Powers Procedure Act which we regarded as a

¹See p. 1235, *supra*.

sort of procedural "Bill of Rights" for the Province. There we emphasized and tried to resolve some of the difficulties in attempting to define in language, suitable for an ordinary statute, the basic right of the individual to have the rules of natural justice applied in the decision-making process.²

The concept of the right to have the ordinary courts presided over by an independent judiciary is easier to express than the concepts of some other rights or freedoms. It has been part of the legal thought attached to British institutions for nearly 300 years. At the same time it has been a developing concept. Until the year 1952, those who presided over the magistrates courts were given no security of tenure. On the other hand, as we have pointed out earlier in this Report³ some safeguards are required to protect the rights of the individual with reference to the conduct of judges that cannot be adequately safeguarded through a right of appeal.

We now have in Canada a Bill of Rights binding with respect to those matters that come within Federal jurisdiction. The seven rights and freedoms which we have set out include in substance most of the rights and freedoms set out in the Canadian Bill of Rights. It is contended that the declared rights and freedoms would be more secure if they were entrenched in the constitution. This is true only to the extent that they may now be abridged or altered by an Act of the Parliament of Canada. But this is equally true of the British Bill of Rights, the Habeas Corpus Act and the Magna Charta,⁴ which have all stood as pillars of English law for centuries. It may be that the Canadian Bill of Rights should be strengthened, but we are not convinced that it should be entrenched. We think it would be unwise for the Province of Ontario to compromise those areas of legislative jurisdiction that it now enjoys by agreeing to the constitutional entrenchment of a national Bill of Rights. If there is to be a readjustment with respect to the subjects over which the Federal Government and the Provincial Governments should have legislative jurisdiction, it should be through agreement between the Provinces and the national

²See Chapter 14, p. 206 ff.

³See Chapter 93.

⁴Steps are now being taken in the British Parliament to repeal certain sections of the Magna Charta which have become obsolete.

Government with regard to subject matters and not through the entrenchment of a Bill of Rights in the constitution, which would indirectly affect the legislative powers of the Provinces and which, by judicial interpretation, could effectively alter those powers.

A PROVINCIAL BILL OF RIGHTS

Legislation in Ontario has always been passed by an ordinary majority according to British parliamentary procedure. This was true in the Legislative Council and Assembly of Upper Canada and the Parliament of the Province of Canada prior to 1867. The British North America Act specifically recognized that the constitution uniting the Provinces of Canada, Nova Scotia and New Brunswick should be one "similar in principle to that of the United Kingdom."⁵ It was specifically provided that "Questions arising in the House of Commons shall be decided by a Majority of Voices other than that of the Speaker, and when the Voices are equal, but not otherwise, the Speaker shall have a Vote."⁶ By section 87 this provision was made applicable to the Province of Ontario.

Entrenchment by a Requirement for a Special Majority

The question is raised, could the Legislature of Ontario pass a statute by ordinary majority that institutes a new method of change for a specified matter which would amount to a special entrenchment? Some scholars contend that it could; others think that it could not. Those who contend that it could rely on the provisions of section 92 (1) of the B.N.A. Act which reads:

"In each Province the Legislature may exclusively make Laws in relation to . . . the Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor."

Let us take for example the Human Rights Code. The Legislature of Ontario passed an Act by ordinary majority

⁵See preamble to The B.N.A. Act.

⁶B.N.A. Act, s.49.

providing for the Human Rights Code discussed earlier in this Section and it has been amended three times in the same manner.⁷ The statute could now be repealed or amended in the same way by an ordinary majority.

The question is, could the Legislature now enact by a simple majority an ordinary statute providing that henceforth the Ontario Human Rights Code could be amended or repealed only by a statute passed by a two-thirds majority of members of the Legislature present and voting and no less? Moreover, could it provide that the requirement for a two-thirds majority *in this respect* could not *itself* be changed to anything else, except by a statute passed by at least a two-thirds majority. If it could the requirement for a two-thirds majority would then be the only legal or constitutional method of changing the Ontario Human Rights Code.

Dean Tarnopolsky after discussing several relevant cases and particularly the decision of the Judicial Committee of the Privy Council in *The Bribery Commissioner v. Rana-singhe*⁸ came to the conclusion that one Parliament could by simple majority enact a statute and stipulate the manner and form required for its repeal or amendment. The requirement of a certificate by the Speaker that two-thirds or three-quarters of those voting for the repeal or amendment before the matter could be referred to the Lieutenant Governor for approval would be a matter of manner and form.⁹

On the other hand, it is argued that to recognize that one Parliament can bind successive parliaments or even that one session of Parliament can bind a subsequent session is a denial of the democratic process of majority rule. Under our system of government the people elect the members of Parliament to govern for the life of the Parliament. It is quite contrary to our concept of democratic government to deny the people the right to turn out the elected members if they pass bad laws and to have the bad laws repealed by a succeeding parliament. It is likewise a denial of the theory of responsible government that a law passed on a majority vote cannot be

⁷Ont. 1961-62, c.93; 1965, c.85; 1967, c.66; 1968, c.85.

⁸[1965] A.C. 172.

⁹Tarnopolsky, *The Canadian Bill of Rights*, 60 ff., especially 89.

repealed during the same session of Parliament if a majority of the members so vote. The whole theory of responsible government based on the principles of the British Constitution is that the government must command the confidence of the House based on a majority vote.

If one admits the right of the Legislature to effectively declare that a statute passed by a majority, be it even one vote, shall not be repealed or amended except by a majority of two-thirds or three-quarters of the votes cast one denies to successive sets of voters who change from election to election the right to govern themselves through a truly democratic process. The majority could well be subjected to the will of the minority. We have said that the primary ideas of a modern state are its fundamental constitutional laws. We also said: "Law is not primarily a matter of coercion and punishment, rather it is primarily a matter of setting standards for society and devising solutions for critical social problems that attract willing acceptance from most people because those standards and solutions offer some measure of the modern concept of substantial justice."¹⁰

It necessarily follows from this that when the ideas expressed by a previous Parliament are inconsistent with the ideas of those who elect a succeeding Parliament that the later Parliament should be free to give effect to the ideas that are considered to be necessary to meet the social conditions then prevailing.

In the *Ranasinghe* case the constitutional instrument which conferred the power to legislate on the legislative body defined the terms on which legislation could be passed with respect to the relevant subject matter. It is true that there are no such expressed terms in the British North America Act with regard to the power of the Legislature to amend the constitution of the Province. Nevertheless the whole scheme of legislative power conferred on the federated bodies and the Federal Parliament is based on a majority rule. Federation was a plan for the distribution of legislative power based on "a constitution similar in principle to the United Kingdom." To admit that one province could require a two-thirds vote

¹⁰See p. 1487, *supra*.

on some or all of the subjects within its legislative power and another to require a three-quarters vote and another a majority vote would create a constitution that would be quite dissimilar to that of the United Kingdom.

There is another aspect of the matter that goes beyond the precise construction of the words used in the B.N.A. Act with respect to the distribution of powers, including the powers conferred on the Legislatures of the provinces to make laws with respect to the amendment of "the Constitution of the Province, except as regards the Office of the Lieutenant Governor."¹¹ Sections 91 and 92 particularly deal with distribution of powers between the Federal Parliament and the Provincial Legislatures. However, Chief Justice Duff in *Reference Re Alberta Statutes*¹² in considering legislation affecting the freedom of the press in Alberta went deeper into the fundamental principles involved in the constitution as an instrument of the democratic process. He said:

"Under the constitution established by *The British North America Act*, legislative power for Canada is vested in one Parliament consisting of the Sovereign, an upper house styled the Senate, and the House of Commons. Without entering in detail upon an examination of the enactments of the Act relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by such of the population of the united provinces as may be qualified to vote. The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and

¹¹B.N.A. Act, s.92 (1).

¹²[1938] S.C.R. 100 at 132.

by the electors themselves of their responsibilities in the election of their representatives.

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James v. Commonwealth*,¹³ 'freedom governed by law.'

Even within its legal limits, it is liable to abuse and grave abuse, and such abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

. . . Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the legislatures of the provinces, or to the legislature of any one of the provinces, as repugnant to the provisions of *The British North America Act*, by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the province, or a matter private or local within the province. It would not be, to quote the words of the judgment of the Judicial Committee in *Great West Saddlery Co. v. The King*¹⁴ 'legislation directed solely to the purposes specified in section 92'; and it would be invalid on the principles enunciated in that judgment and adopted in *Caron v. The King*.¹⁵

We deduce from what the learned Chief Justice has said that since "the constitution of the Dominion is to be similar in principle to that of the United Kingdom" that the very institution of parliament and its efficacy depends on free discussion of public affairs "criticism and answer and counter-criticism" which is "the breath of life for parliamentary institutions."

¹³[1936] A.C. 578, at 627.

¹⁴[1921] 2 A.C. 91, at 122.

¹⁵[1924] A.C. 999, at 1005-6.

This being true the learned Chief Justice made it quite clear that the legislature of a province could not by legislation smother this "breath of life" insofar as the Parliament of Canada is concerned.

In *Switzman v. Elbling and A.G. of Quebec*¹⁶ Abbot, J. carried the learned Chief Justice's reasoning to its logical conclusion. After referring to the passage in the Alberta case which we have just quoted, he said:

"The *Canada Elections Act*, the provisions of the *British North America Act* which provide for Parliament meeting at least once a year and for the election of a new parliament at least every five years, and the *Senate and House of Commons Act*, are examples of enactments which make specific statutory provision for ensuring the exercise of this right of public debate and public discussion. Implicit in all such legislation is the right of candidates for Parliament or for a Legislature, and of citizens generally, to explain, criticize, debate and discuss in the freest possible manner such matters as the qualifications, the policies, and the political, economic and social principles advocated by such candidates or by the political parties or groups of which they may be members.

This right cannot be abrogated by a Provincial Legislature, and the power of such Legislature to limit it, is restricted to what may be necessary to protect purely private rights, such as for example provincial laws of defamation. It is obvious that the impugned statute does not fall within that category. It does not, in substance deal with matters of property and civil rights or with a local or private matter within the Province and in my opinion is clearly *ultra vires*. Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good government of the nation."¹⁷

It necessarily follows that neither Parliament nor the province could under a constitution similar in principle to

¹⁶[1957] S.C.R. 285.

¹⁷*Ibid.*, 327-28.

that of the United Kingdom effectively destroy the whole democratic scheme of law-making by denying to the electors the right to change laws in the Legislature which have been made on a majority vote by repealing or amending them likewise by a majority vote. It can be strongly argued that if such a power is acknowledged the influence of public opinion and public debate would be more effectively destroyed in the law-making process than by restricting the freedom of the press or the freedom of public discussion. Public discussion would be largely useless if effective results could be destroyed by onerous majority requirements imposed by a mere majority vote, be it of one man in a previous Legislature.

Even if the Province could entrench a Bill of Rights by a statute passed by an ordinary majority vote which required a two-thirds majority or three-quarters majority of those voting in the Legislature to repeal or amend it, we think this should not be done. The principle is wrong for one Parliament to seek to bind a succeeding Parliament and a new class of voters electing that Parliament. If such a principle was adopted it could produce the gravest injustices and could in large measure defeat the whole purpose of periodic general elections.

Entrenchment by a Requirement for a Referendum

There remains to be considered the suggestion that there should be an entrenchment of a Bill of Rights in the constitution of the Province which could only be altered through a referendum by submitting the alteration to qualified electors. This would undoubtedly be a democratic process and it is the procedure followed in the State of New York. Whether this could legally be done is another question—a question on which we do not have to come to a conclusion.

In the first place, the arguments advanced against shackling the legislative powers of succeeding legislatures by imposing conditions of a two-thirds majority on powers of repeal or amendment of a statute passed by a simple majority apply to shackling the powers of a succeeding Parliament to repeal or amend by requiring the submission of a question to a referendum.

In the *Initiative and Referendum Act* case¹⁸ the Judicial Committee held that an Act providing that on the petition of the electors being not less than eight percent of the number of votes polled at the last election the Legislature was required to submit proposed legislation to a vote of the people and if approved by a majority of those voting the Act should become law "as though such law were an Act of the Legislature," was *ultra vires*. The ground on which the Judicial Committee based its judgment was that the legislation affected the position of the Lieutenant Governor as an integral part of the Legislature and detracted from rights which are important in the legal theory of that position.

On the other hand, it was held in *Rex. v. Nat Bell Liquors Ltd.*¹⁹ that the Liquor Act of Alberta passed in the following circumstances was *intra vires*. A petition was duly presented to the Legislative Assembly pursuant to the provisions of the Direct Legislation Act²⁰ praying that a bill identical with the Liquor Act should be enacted. The Bill was presented to the people of Alberta as required by the Direct Legislation Act and voted on. The vote was favourable and the Legislature thereupon passed the Act without substantial alteration. In due course it was approved by the Lieutenant Governor and became law. The Judicial Committee held that the Act having been passed by the Legislature was a valid Act notwithstanding the process followed to obtain an expression of the will of the people.

Neither of these cases covers the point as to whether the Legislature could divest itself of power to repeal or amend an Act passed by an ordinary majority without first submitting it to a vote of the electors. The Direct Legislation Act of Alberta provides for a means of getting an expression of the will of the people in the legislative process but it does not put any restraints on the power of the Legislature to legislate without getting an expression of the will of the people.

The procedure followed in New York State is to submit amendments to the State Constitution to the electors. A perusal of Appendix "B" to this Section will indicate some of

¹⁸[1919] A.C. 935.

¹⁹[1922] A.C. 128.

²⁰R.S.A. 1955, c.83.

the problems that have arisen in that State in relation to the Bill of Rights. There have been, in all, approximately 300 amendments to the Constitution. There have been 16 amendments to the Bill of Rights Article since 1913. Some amendments put forward by the legislative bodies were ratified and some were not. Where constitutional congresses were called in certain cases the people rejected their recommendations.

The experience in New York State demonstrates that serious difficulties arise when too much detail with respect to rights and freedoms is entrenched in a constitution. Whether the process of amendment by referendum has proved to be satisfactory is a matter that would require very exhaustive study.

A Bill of Rights Without Entrenchment

We have come to the conclusion that the Province of Ontario should have a Bill of Rights covering certain areas of rights and freedoms but that no attempt should be made at this time to entrench it in the constitution so as to bind future legislatures. Experience and patience will no doubt dictate in time as to whether entrenchment is necessary or would be beneficial and what the nature of the entrenchment should be if it is considered to be wise, necessary, and possible.

As we have emphasized earlier, a solemn statutory declaration, general as it may be in form, has profound educative value and it does bind the consciences of legislators. It alerts a vigilant press and it not only establishes standards for public appraisal of legislation insofar as there may be unjustified encroachments on civil rights, but it lays down rules limiting Ministers and Departments in putting forward legislation that would advance their own power at the expense of the rights of individuals.

We recommend that a Provincial Bill of Rights should be enacted for Ontario in ordinary statutory form in the same manner as has been done in the Province of Saskatchewan.²¹

The Act should include a declaration of the seven rights

²¹R.S.S. 1965, c.378. For convenience we have set out the Saskatchewan Act with amendments in Appendix "C" to this Section.

and freedoms we have set out as securing the foundation of the democratic process. These should be expressed in appropriate language as general statements of rights and freedoms. In addition, the statute should recognize all those rights and freedoms incorporated in the Canadian Bill of Rights but not comprehended in the seven rights and freedoms we have set out insofar as the Provincial Legislature has power to legislate. There should be no attempt to qualify in detail the general statement of rights and freedoms nor to catalogue exceptions, but the statute should state that the declaration lays down guidelines for legislators and presumptions for interpretation of legislation to be followed by courts and tribunals.

It should be made clear in general terms that the rights and freedoms declared are not absolute but are subject to proper limitations.

No attempt should be made to incorporate the provisions of the Ontario Human Rights Code in the general declaration of rights and freedoms. The Ontario Human Rights Code is an advanced piece of specific legislation that is better dealt with as a unit. It is now an effective Bill of Rights in the areas covered by it.²²

We do not think that the declaration in the Bill of Rights should deal with language rights. Some agreement in principle has been reached as to objectives, but the subject is one for specific legislation and cannot properly be dealt with in general terms. Before any statutory declaration of language rights could be decided upon there would have to be detailed studies of economic, educational and fiscal matters and much research would have to be undertaken going far beyond the terms of reference of this Commission.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1. The importance of a Bill of Rights is in its persuasive and rational impact on the ordering of society, not in its authoritative form.

²²The Act and the powers of the Minister and the Commission will be discussed in our next report.

2. The highest recognition of the equality and final worth of human individuals in the realm of politics and law is the right of each to vote on the basis of universal adult suffrage in periodic and free elections, where the constituencies are so arranged by population that one man's vote is substantially as great in influence as another's.
3. A philosophy of government should not be adopted which deprives the people of the ultimate right to determine their own social affairs through democratic processes and transfers the final power of decision in certain areas to appointed officials—the judges.
4. The modern democratic Canadian Parliament and Legislatures are superior to the courts in their title to primacy in major decisions of social policy. Parliamentary bodies have the matching institutional design and procedure.
5. It would be unwise for a government to lock itself into a constitutional straitjacket where the making of new laws to meet changing social conditions would be made almost impossible by reason of the difficulty in obtaining relief through amendment to the constitution.
6. The entrenchment of a national Bill of Rights should not be considered until a flexible amending procedure for the constitution is decided upon.
7. Ontario should not compromise the areas of legislative jurisdiction that it now enjoys by agreeing to constitutional entrenchment of a national Bill of Rights. If there is to be a readjustment of subjects between the federal and provincial governments it should be by express agreement and not indirectly through the entrenchment of a Bill of Rights.
8. Grave doubt exists as to whether the Province of Ontario could entrench a Provincial Bill of Rights by enacting a statute passed by ordinary majority which could only be amended or repealed by a statute passed by a greater majority than an ordinary majority.
9. Even if Ontario could entrench a Provincial Bill of Rights by a statute passed by an ordinary majority which

would require more than an ordinary majority of those voting in the Legislature to repeal or amend it, this should not be done. It is wrong in principle for one parliament to seek to bind a succeeding parliament and the new class of voters electing that parliament.

10. In any case if entrenchment of a Bill of Rights is considered feasible it should be confined to the definition of the individual rights which themselves are the foundation of parliamentary democracy and these should be expressed in carefully qualified terms.
11. The Province should adopt a Bill of Rights enacted in ordinary statutory form as was done in Saskatchewan.
12. The statute should declare in appropriate language the following rights and freedoms which are the foundation of parliamentary democracy:
 - (1) The right of every person to freedom of conscience and religion.
 - (2) The right of every person to freedom of thought, expression and communication.
 - (3) The right of every person to freedom of assembly and association.
 - (4) The right of every person to security of his physical person and freedom of movement.
 - (5) The right of every adult citizen to vote, to be a candidate for election to elective public office, and to fair opportunity for appointment to appointive public office on the basis of proper personal qualifications.
 - (6) The right of every person to fair, effective and authoritative procedures, in accordance with principles of natural justice, for the determination of his rights and obligations under the law, and his liability to imprisonment or other penalty.
 - (7) The right to have the ordinary courts presided over by an independent judiciary.

The statute should also include the rights and freedoms set out in the Canadian Bill of Rights but not included in the rights and freedoms we have enumerated.

13. There should be no attempt to qualify in detail the general statement of rights and freedoms nor to catalogue exceptions.
14. It should be made clear in general terms that the rights and freedoms are not absolute but are subject to proper limitations.
15. It should be stated that the declaration lays down guidelines for legislators and presumptions for interpretation of legislation to be followed by courts and tribunals.
16. No attempt should be made to incorporate the provisions of the Ontario Human Rights Code in the general declaration of rights and freedoms. It should be dealt with as a specific piece of legislation.
17. The Ontario Bill of Rights should not deal with language rights. Those rights should be dealt with in specific legislation, not in general terms.
18. A Bill of Rights properly drawn should be educative; it should bind the consciences of legislators, establish standards for public appraisal of legislation and alert a vigilant press.

APPENDIX "A" TO SECTION 3

Self-Incrimination American Experience

INTRODUCTION

The British and Canadian approach to the problem of protecting the rights of the individual against self-incrimination has been to leave the matter to the common law and the legislatures. The judges formulated the common law but with changing circumstances the legislatures modified it. In the United States of America the protection has been entrenched in the language of the constitution with power in the judges by a process of interpretation to enlarge or diminish the protection without power in the legislatures to alter their interpretation. Charles Evans Hughes, later Chief Justice of the United States, said: "The Constitution is what the judges say it is."¹

The Virginian Declaration adopted in 1776 was apparently a model for seven states: ". . . in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; *nor can he be compelled to give evidence against himself*; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers." (*Italics added.*)

It was not until 1791 that the protection against self-incrimination became a part of the Constitution of the Union, when the Fifth Amendment was adopted. It reads:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the

¹Mayers, *Shall We Amend the Fifth Amendment?* 183.

militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*" (Italics added.)

WHEN THE PROTECTION ARISES

It is not difficult to determine from the language of the Amendment what its framers meant to say with respect to self incrimination. This is especially true in the light of the fact that there was a common law protection at the time the Declaration was drawn and that the language was less restricted than that used in the state Constitutions.

The history of that part of the Amendment with which we are concerned here shows that as it was originally proposed it read "no person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . ." "The debates on this clause show that it was objected to because it 'contained a general declaration in some degree contrary to laws passed. The member objecting alluded to that part where a person shall not be compelled to give evidence against himself. He thought it ought to be confined to criminal cases, and moved an amendment for that purpose, which amendment being adopted, the clause as amended was unanimously agreed to'."²

For 75 years the courts of the United States did not appear to have much difficulty in construing the language and defining its scope. The construction was confined to a prohibition against compelling an accused to testify against himself.

As early as 1807, Chief Justice Marshall in a classic discussion of the witness' privilege against self-incrimination restricted it entirely to the common law with no suggestion that this privilege was granted by the Fifth Amendment. In dealing with the common law privilege of the witness he said:

"Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. . . . It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."³

²*United States v. Three Tons of Coal*, 28 Fed. Cas 149, 152 (1875).

³*United States v. Burr*, 25 Fed. Cas. 38 at p. 40.

As late as 1870 in three cases⁴ concerning a statute authorizing the questioning of taxpayers under oath by revenue authorities, arguments raised on the privilege against self-incrimination on the ground of the Fifth Amendment were rejected.

In *Boyd v. United States*^{4a} the Supreme Court entered upon a course of construction of a legislative character not limited by the usual safeguards that limit the power of the courts traditionally applied in construction of statutes in British and Canadian courts as stated by Lord Simonds in *Magor v. Newport*:⁵ "The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited." And the learned Law Lord in referring to the judgment appealed from went on to say, "The second part of the passage that I have cited from the judgment of the learned Lord Justice is no longer the logical sequel of the first. The court, having discovered the intention of Parliament and of Ministers too, must proceed to fill in the gaps. What the legislature has not written, the court must write. This proposition which restates in a new form the view expressed by the Lord Justice in the earlier case of *Seaford Court Estates Ltd. v. Asher*⁶ . . . cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of an interpretation."^{6a} In *Bank of Toronto v. Lambe*⁷ Lord Hobhouse in giving the judgment of the Judicial Committee of the Privy Council in a case involving the interpretation of the British North America Act said, "But questions of this class have been left for the decision of the ordinary Courts of law which must treat the provisions of the Act in question by the same methods of construction and exposition which they apply to other statutes."⁸

In the *Boyd* case the Supreme Court extended the privilege of the Fifth Amendment to a forfeiture case. The court's opinion was that although the proceeding was "not technically a criminal proceeding" and not therefore "within the literal terms of the Fifth Amendment"⁹ it was in its "nature criminal" although "civil in form".¹⁰ The court said that the proceeding "though technically a civil proceeding, is in substance and effect a criminal one". "[S]uits for penalties and forfeitures incurred by the commission

⁴ *In re Meador*, Fed. Cas. No. 9375 (1869); *Stanwood v. Green*, Fed. Cas. No. 13,301 (1870); *In re Strouse*, Fed. Cas. No. 13,548 (1871).

^{4a} 116 U.S. 616 (1886).

⁵ [1952] A.C. 189.

⁶ [1949] 2. K.B. 481, 498-9.

^{6a} [1952] A.C. 189, 191.

⁷ [1887] A.C. 575.

⁸ *Ibid.*, 579.

⁹ *Boyd v. U.S.* 116 U.S. 616, 633 (1886).

¹⁰ *Ibid.*, 634.

of offences against the law are of this quasi-criminal nature" and consequently "within the reason of criminal proceedings for all the purposes of the Fifth Amendment".¹¹ A further difficulty arose in this case. The proceeding was *in rem* against the goods. The court held that while the owner was not a "nominal" party to the proceedings he was a "substantial party" thereto and therefore could claim the privilege.¹²

The result was that the court enlarged the meaning of the words in the Fifth Amendment "in any criminal case" to include a case not "technically" a criminal case but "civil in form". This is a construction that cannot logically be drawn from the context in which the words of the Amendment were used: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb, nor shall be compelled in any criminal case to be a witness against himself." This legislative step taken by the court was merely a preliminary to those that were to follow.

Six years after the *Boyd* case in *Counselman v. Hitchcock*,¹³ the Supreme Court embarked on a policy of legislative enlargement of the reach of the Fifth Amendment that was to continue until 1968. In the *Boyd* case the court had gone to considerable length to bring the facts of the case within the words used in the Amendment—"in any criminal case" and to hold that the owner of the goods was a "substantial party". In the *Counselman* case the court, for the first time, extended the protection to a witness giving evidence before a grand jury. The court based its decision on "the object of the constitutional provision" and not on a mere interpretation of the language used in its context. In the ordinary interpretation of statutes the court is always entitled to seek from the words used the object of the statute but the court is not entitled to decide what the object of the statute should be and to interpret the language accordingly. The court said, "The object [of the constitutional provision] was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime."¹⁴ This has been termed "a naked exercise of judicial power unsupported by rational demonstration."¹⁵

In 1896, Brown, J. in delivering the opinion of the Supreme Court said, "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities

¹¹*Ibid.*

¹²*Ibid.*, 638.

¹³142 U.S. 547 (1892).

¹⁴*Ibid.*, 562.

¹⁵Mayers, *Shall We Amend the Fifth Amendment?* 209.

which we had inherited from our English ancestors, and which from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case.”¹⁶ And he then went on to illustrate some of the exceptions.

In 1913, Mr. Justice Holmes in referring to *Robertson v. Baldwin* said, “But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.”¹⁷

As we shall see the courts in the exercise of their legislative power of interpretation have departed widely from the philosophy of their earlier decisions.

In 1920 the court held¹⁸ that the protection in the constitution extended to a bankrupt who refused to answer questions as to his assets as required by statute, claiming that the answers might tend to incriminate him.

In 1924 the issue as to whether the privilege of the Fifth Amendment extended to a witness in civil proceedings was expressly put before the court.¹⁹ The court held that it did. Mr. Justice Brandeis said:

“The Government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. *The contrary must be accepted as settled.* The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant. It protects, likewise, the owner of goods which may be forfeited in a penal proceeding. See *Counselman v. Hitchcock*.”^{19a}

The result was that the words “in any criminal case” which are clear and unambiguous were by judicial legislation amended to read “in any case”.

In 1955 the protection was extended to witnesses before legislative committees.²⁰

¹⁶*Robertson v. Baldwin*, 165 U.S. 275 at 281.

¹⁷*Gompers v. United States*, 233 U.S. 604 at 610 (1913).

¹⁸*Arndstein v. McCarthy*, 254 U.S. 71.

¹⁹*McCarthy v. Arndstein*, 266 U.S. 34.

^{19a}*Ibid.*, 40-42. (Italics added.)

²⁰*Emspak v. United States*, 349 U.S. 190 and *Quinn v. United States*, 349 U.S. 155.

So far we have been considering the development of the law with respect to the protection of witnesses who were being examined under oath, that is, being "a witness" as the words are used in the Constitution.

In 1964 and 1966 the privilege was extended to those not yet under oath and not necessarily charged with any crime.²¹ In the *Miranda* case Chief Justice Warren said:

"Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."²²

The protection against self-incrimination would seem to extend to a person when "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect" or when a person is deprived of his "freedom of action in any significant way."

THE EXTENT OF THE PROTECTION

In 1807 Chief Justice Marshall defined the extent of the protection at common law as we have previously indicated.

In 1892 in the *Counselman* case²³ the court in dealing with an immunity statute held that unless the statute granted immunity from everything covered by the privilege it was insufficient to dislodge the privilege. The court said:

"It remains to consider whether [the immunity statute] removes the protection of the constitutional privilege of Counselman. That section . . . protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. *It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he*

²¹*Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Miranda v. Arizona*, 384 U.S. 436 (1966).

²²*Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

²³142 U.S. 547.

might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

The constitutional provision distinctly declares that a person shall not 'be compelled in any criminal case to be a witness against himself,' and the protection of [the immunity statute] is not co-extensive with the constitutional provision."²⁴

This declaration was the foundation for the development of the constitutional doctrine that followed. The law that the witness was excused from giving answers which might furnish a link in the chain of proof against him was extended to a protection against answering questions where the answers might reasonably enable the prosecutor "to search out other testimony" and to obtain "witnesses and evidence . . . attributable to his compelled answers". This constituted an enormous extension of the phrase used in the Constitution— "a witness against himself."²⁵

"Some reasonable ground for apprehending danger" of exposing oneself to criminal prosecution before information could be held privileged would appear to be the test for limiting the privilege as applied in 1917 in *Mason v. United States*.²⁶ In this case²⁷ the court relied on the common law and quoted from Chief Justice Cockburn in *Regina v. Boyes*:

"To entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. . . . A question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. . . .

Further than this, we are of opinion that the danger to be apprehended *must be real and appreciable*, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice."²⁸

In 1952, Hastie, J. of the United States Court of Appeals for the Third Circuit, after having had considerable difficulty in

²⁴*Ibid.*, 564-65 per Blatchford J.

²⁵Mayers, *Shall We Amend the Fifth Amendment?* 211.

²⁶244 U.S. 362.

²⁷pp. 365-66.

²⁸1 Best and Sm. 311, 329-330, 121 Eng. Rep. 730. (Italics added.)

applying the Supreme Court's decision said, in *United States v. Coffey*:

"[W]e think the problem is what to do about apparently innocuous questions, the answers to which are admittedly not incriminating in themselves, when there are no additional facts before the Court which suggest particular connecting links through which the answer might lead to and might result in incrimination of the witness. We think the Supreme Court is saying that such facts are not necessary to the sustaining of the privilege. The decision in the *Mason* case would not be followed today. It is enough (1) that the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime against the United States, and (2) that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case. It is in this latter connection, the credibility of the suggested connecting chain, that the reputation and known history of the witness may be significant. Finally, in determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection incrimination may be approached and achieved by obscure and unlikely lines of inquiry."²⁹

This statement was accepted by the authors of the *McNaughton* Revision of *Wigmore on Evidence* as fairly stating the federal law.³⁰

The extent to which the doctrine may be applied is exemplified in *Greenberg v. United States*.³¹ In this case a witness before a grand jury was asked to identify the business in which he used a particular telephone number and whether he knew certain individuals. These were believed to be engaged in "the numbers racket". The contention put forward by counsel on behalf of the witness was that the answers "might suggest subsequent questions or investigations which in turn might reveal that he was a proprietor who employed other persons in the numbers business, that the numbers runners in question were among his employees, that he was required by the laws of the United States to withhold part of their wages and to make certain returns for Income and Social Security Tax purposes, and that he had wilfully failed to do so, thus subjecting himself to Federal criminal prosecution." The judge in the first instance regarded the connection between the questions asked and any possible violation of the Income Tax and Social Security laws to be too remote to create a reasonable danger

²⁹198 F. 2d. 438 at 440-41 (1952).

³⁰Vol. VIII, p. 425.

³¹343 U.S. 918 (1952).

of prosecution and the regional appellate court affirmed this decision. The Supreme Court set it aside and released the witness.

In 1955 in *Emspak v. United States*³² Warren, C. J. quoted with approval from *Hoffman v. United States*.³³

“‘To sustain the privilege’, this Court has recently held, ‘it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result’.”

In a dissenting judgment, Harlan, J. said:

“... the more recent decisions of this Court appear to me to leave the standard for determining whether a question is incriminatory in great confusion. For example, the Court of Appeals for the Third Circuit had occasion not so long ago to manifest its bewilderment as to where this aspect of the privilege against self-incrimination now stands in the light of recent decisions of this Court. (See *United States v. Coffey*, 198 F. 2d. 438 (1952).) In short, I think the standard for judging the character of a question against which the Fifth Amendment privilege is asserted needs both rehabilitation and restatement.”³⁴

After quoting from the latter part of the last paragraph of that portion of the judgment of Chief Justice Cockburn in *Regina v. Boyes* which we have already quoted^{34a} the learned judge said:

“Throughout the course of its decisions this Court has consistently stated that the ‘real danger v. imaginary possibility’ test is the proper standard to be applied in deciding whether particular questions are subject to a valid Fifth Amendment claim.”³⁵

and after referring to several decisions he went on to say,

“But in recent *per curiam* reversals of contempt convictions this Court seems to have indicated a tendency to stray from the application of this traditional standard. Reference was made to *Greenberg v. United States*³⁶ and *Singleton v. United States*.³⁷

In a companion case, *Quinn v. United States*³⁸ Reed, J. dissenting with Harlan, J. concurring said:

“The purpose of having witnesses is to furnish to proper interrogators, subject to objections for materiality or use of coercion, the

³²349 U.S. 190 at 198 (1955).

³³341 U.S. 479 at 486-87 (1951).

³⁴*Emspak v. U.S.*, 349 U.S. 190, 204.

^{34a} See p. 1617 *supra*.

³⁵*Emspak v. U.S.*, 349 U.S. 190, 206.

³⁶341 U.S. 944 (1951) and 343 U.S. 918 (1952).

³⁷343, U.S. 944 (1952).

³⁸349 U.S. 155 (1955).

actual facts they seek. Legislation can best be drafted and cases tried most fairly only when all pertinent facts are made available to those charged with legislation or maintenance of the peace. However, the Congress in the first series of Amendments to the Constitution wrote an exception to this duty in the instance where an answer would compel a person to be a witness against himself in a criminal case. In that situation, on a valid claim of privilege against self-incrimination, the witness may be excused from answering. That exception should be neither shriveled nor bloated. It is designed to excuse the guilty and the innocent alike from testifying when prosecution *may reasonably be feared from compelled disclosures*. The importance of preserving the right to require evidence, except where a witness definitely apprises the interrogating body of a valid claim of privilege, leads us to dissent."³⁹

It is clear that the courts have by judicial legislation extended the scope of the protection given by the Constitution far beyond anything that those who drafted it conceived to be its purpose.

It is also a reasonable conclusion that during the last 40 years criminal courts, civil courts and investigating bodies as well as judges hearing contempt motions have been in great confusion as to when and under what circumstances a witness may be entitled to the privilege of the Fifth Amendment.

WHAT IS PROTECTED?

The legislative power exercised by the Supreme Court with respect to the Fifth Amendment is also demonstrated by its decisions respecting "what is protected by the Amendment." In 1944 the Court held in *United States v. White*⁴⁰ that "papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity." The case involved the claim of privilege with regard to certain documents, by an officer of a labour union on behalf of himself personally, or the union, or as an officer of a union. The claim arose in the course of a grand jury investigation into alleged irregularities in the construction of a depot.

The court found (1) that the circumstances did not establish grounds for the claim of personal privilege; (2) that the respondent could not claim privilege on behalf of the union as the privilege only applies to natural persons. "Moreover, the privilege is personal to the individual called as a witness, making it impossible for him to set up the privilege of a third person as an excuse for a refusal to answer or to produce documents."⁴¹ (3) The claim

³⁹*Ibid.*, 173.

⁴⁰322 U.S. 694, 699.

⁴¹*Ibid.*, 704.

on behalf of himself as an officer of the union or an official was denied. The documents "were official documents held by him in his capacity as a representative of a union. No valid claim was made that any part of them constituted his own private papers. He thus could not object that the union's books and records might incriminate him as an officer or as an individual."⁴²

In discussing the principle laid down in this case, Mayers says:

"The witness' right to withhold documents in his possession is restricted to those which he owns (or to which at any rate he has the right of possession for his own benefit). This limitation has produced in the bankruptcy proceeding a somewhat Gilbertian result. While the bankrupt under examination may, on the plea that they contain criminatory entries, withhold his books from the court, he may not withhold them from his trustee in bankruptcy, who must produce them in court if so ordered, for use as evidence in the prosecution of the bankrupt. The reason why the bankrupt may not withhold his criminatory records from his trustee is that the books and papers of his business are part of the property which the law requires him to surrender to the trustee. 'To permit him to retain possession because surrender might involve disclosure of a crime, would', the Supreme Court has explained, 'destroy a property right. The constitutional privilege relates to adjective [i.e. procedural] law. It does not relieve one from the substantive obligation to surrender property'.⁴³

If, as the Court seemed to feel in the first case in which it passed on the Fifth Amendment privilege, the right to withhold incriminating documents from the courts is one of the sacred rights for which patriots fought and bled is it not something like pettifoggery to destroy that right by invoking the technical property right of the trustee and by drawing pedantic distinctions between *substantive* and *adjective* law?"⁴⁴

In 1948 the court held in *Shapiro v. United States*⁴⁵ that where a document is required to be kept by a government regulation it is not subject to the privilege on the ground that where legislation requires records to be kept they are vested with a public nature and the keeper's control over them is removed. Jackson, J. in a dissenting judgment, considered this doctrine contained a dangerous potential. He said:

"The protection against compulsory self-incrimination, guaranteed by the Fifth Amendment, is nullified to whatever extent this Court holds that Congress may require a citizen to keep an account of his deeds and misdeeds and turn over or exhibit the

⁴²*Ibid.*

⁴³*McCarthy v. Arndstein* 266 U.S. 34, 41 (1924).

⁴⁴Mayers, *Shall We Amend the Fifth Amendment?* 144-45.

⁴⁵335 U.S. 1 (1948).

record on demand of government inspectors, who then can use it to convict him.⁴⁶

... It would, no doubt, simplify enforcement of all criminal laws, if each citizen were required to keep a diary that would show where he was at all times, with whom he was, and what he was up to. The decision of today, applying this rule not merely to records specially required under the Act but also to records 'customarily kept,' invites and facilitates that eventuality."⁴⁷

In 1953 in *United States v. Kahriger*⁴⁸ it was held that a statute requiring gamblers to register was not unconstitutional. The court took the view that the registration only applied to the future practice of gambling and the Fifth Amendment applied to past events. The gambler had a choice either to give up gambling or to register and registering was a waiver of the privilege. In 1955 the court adhered to this view.⁴⁹

However in 1965 the extent of the doctrine was re-considered in *Albertson v. Subversive Activities Control Board*.⁵⁰ The Court dealt with a statute compelling individuals to register as members of the Communist Party notwithstanding their claim of the protection of the Fifth Amendment privilege against self-incrimination. The Court after pointing out that the privilege would provide a basis for refusing to answer a similar question on the witness stand said: "if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes."⁵¹ The Court considered that the registration required by the statute was "directed at a highly selective group inherently suspect of criminal activities"⁵² and that the information required by registration was in "an area permeated with criminal statutes."⁵³

Finally in 1967 the Court reviewed the *Kahriger* and *Lewis* decisions and over-ruled them in *Grosso v. United States*⁵⁴ and *Marchetti v. United States*.⁵⁵ These cases were dealt with together. The matter in issue in the *Marchetti* case was whether a person could be compelled to register and pay an occupational tax on gambling and wagering. Harlan, J. giving the leading judgment for the Court dealt with the judgments in the *Kahriger* and *Lewis*

⁴⁶*Ibid.*, 70.

⁴⁷*Ibid.*, 71.

⁴⁸345 U.S. 22 (1953).

⁴⁹*Lewis v. United States*, 348 U.S. 419 (1955).

⁵⁰382 U.S. 70 (1965).

⁵¹*Ibid.*, 78.

⁵²*Ibid.*, 79.

⁵³*Ibid.*, 79.

⁵⁴88 S. Ct. 709 (1968).

⁵⁵88 S. Ct. 697 (1968).

cases and stated, "We find this reasoning no longer persuasive."⁵⁶ The learned judge said:

"In these circumstances, it can scarcely be denied that the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial' hazards of self-incrimination.

Reg. v. Boyes 1 B & S 311, 330;

Brown v. Walker 161 U.S. 591, 599-660;

Rogers v. United States 340 U.S. 367, 374.

... [Petitioner] was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in the chain' of evidence tending to establish his guilt."⁵⁷

The Court accepted the proposition that Congress could tax gamblers but it said, "The question is not whether petitioner holds a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the 'innocent and foresighted'."⁵⁸

The Court rejected its earlier view that registration only applied to the future practice of gambling and the Fifth Amendment only applied to past events. Harlan, J. said the choices offered the petitioner were not such that by choosing not to give up gambling he had "meaningfully waived" his constitutional privilege. The law laid down in the decisions was held to be in error and they were overruled. Stewart, J. in concurring with the majority judgments in the *Grosso* case said, "If we were writing upon a clean slate, I would agree with the conclusion reached by the Chief Justice in these cases [and in *Haynes v. United States* 390 U.S. 85, 88 S.Ct. 722]. For I am convinced that the Fifth Amendment's privilege against compulsory self-incrimination was originally meant to do no more than confer a testimonial privilege upon a witness in a judicial proceeding. (The footnote in the Report adds this, "That, after all, in (sic) what the clause says: 'No person . . . shall be compelled in any criminal case to be a witness against himself . . .') But the Court long ago lost sight of that original meaning.

In the absence of a fundamental re-examination of our decisions . . . I am compelled to join the opinions and judgments of the Court."⁵⁹ Warren, C. J. in a penetrating dissent said:⁶⁰ "In

⁵⁶*Ibid.*, 704.

⁵⁷*Ibid.*, 702.

⁵⁸*Ibid.*, 704.

⁵⁹*Ibid.*, 718.

⁶⁰*Ibid.*

addition to being in disagreement with the Court on the result it reaches in these cases, I am puzzled by the reasoning process which leads it to that result. The Court professes to recognize and accept the power of Congress legitimately to impose taxes on activities which have been declared unlawful by federal or state statutes. Yet, by its sweeping declaration that the congressional scheme for enforcing and collecting the taxes imposed on wagers and gamblers is unconstitutional, the Court has stripped from Congress the power to make its taxing scheme effective." The learned Chief Justice went on to quote from the President's Commission on Law Enforcement and Administration of Justice,⁶¹ to show that it was estimated that the annual intake from gambling in the United States varied from \$7-\$50 billion. This is not an unimportant field of taxation.

In *Haynes v. United States*⁶² with Warren, C. J., dissenting, the Court extended the privilege of the Fifth Amendment by setting aside a conviction of Haynes who was found in possession of a sawed-off shotgun. The relevant statute required that importers, manufacturers and dealers in shot-guns, with barrels less than 18" long and other named weapons of a character that they would be used principally by persons engaged in unlawful activities, should be subject to taxation. Taxes were imposed on the making and transfer of the weapons. Comprehensive requirements were imposed to assure the collection of the tax. An individual who wished to make a weapon coming within the Act was obliged to make a declaration giving detailed particulars of the weapon and himself and to indicate that the weapon was intended for lawful purposes. Anyone wishing to transfer the weapons was likewise required to obtain a written order from the prospective transferee on an application supported by a certificate of the local Chief of Police and accompanied by the transferee's fingerprints and photograph. Every person possessing such a weapon was obliged to register his possession unless he made it, or acquired it by transfer, or importation and the requirements of the Act had been complied with. Failure to comply with the Act's requirements and possession of an unregistered weapon coming within the Act were made offences.

Harlan, J., said, "...the issue in this case is not whether Congress has authority under the Constitution to regulate the manufacture, transfer or possession of firearms; nor is it whether Congress may tax activities which are, wholly or in part, unlawful. Rather, we are required to resolve only the narrow issue of whether enforcement of #5851 (the possession of a firearm that

⁶¹Task Force Report: Organized Crime 3 (1967).

⁶²88 S. Ct. 722 (1968).

has not been registered) against petitioner . . . is constitutionally permissible.”⁶³

The result was that an Act of Congress designed to curb the making, dealing in and transferring of weapons used to promote criminal activities and destruction of life was held to be unconstitutional on the Court’s extension of the language of the Fifth Amendment which Mr. Justice Stewart said “was originally meant to do no more than confer a testimonial privilege upon a witness in a judicial proceeding.”⁶⁴

These cases demonstrate clearly how wide the legislative field is and how great is the legislative power conferred on the courts when subjects are entrenched in a constitution and put beyond the reach of any Legislature.

⁶³*Ibid.*, 726.

⁶⁴*Grosso v. U.S.*, 88 S. Ct. 709, 718 (1968).

APPENDIX "B" TO SECTION 3

New York State Constitution

New York State adopted its first Constitution in 1777. The preamble to that document no doubt reflects the political atmosphere in which it was framed and the philosophy of its framers. It reads in part:

" . . . the many tyrannical and oppressive usurpations of the King and Parliament of Great Britain, on the rights and liberties of the people of the American colonies, had reduced them to the necessity of introducing a government by congresses and committees, as temporary expedients, and to exist no longer than the grievances of the people should remain without redress . . ."

Four new Constitutions have since been adopted¹ and there have been approximately 300 amendments.

AMENDING PROCESS

No method of amendment was provided in the original Constitution but a convention of delegates did adopt certain amendments in 1801 relating to the "Council of Appointments" and the number of senators.

The Constitution of 1821 framed by a convention of that year provided that any amendment might be proposed in the Senate or Assembly and on a majority vote of the members of each House the amendment would be entered in the journals of the House and then referred to the next legislature chosen. Publication was required to be made for the three months prior to the election. If the legislature next chosen agreed to the amendment by a two-thirds majority of all the members elected to each House the amendment was then submitted to the electors qualified to vote. If the majority of the electors approved of the amendment it became part of the Constitution.²

¹1821, sometimes known as the 1822 Constitution, 1846, 1894 and 1938.

The 1938 Constitution was merely a revision of the Constitution of 1894.

²Article VIII, s. 1.

In 1846 the requirement for the approval of a two-thirds majority of the elected members of both Houses was changed to a majority. A clause was added providing for a further method of amendment reading as follows:

"At the general election to be held in the year 1866, and in each 20th year thereafter, and also at such time as the legislature may by law provide, the question "Shall there be a convention to revise the Constitution, and amend the same?" shall be decided by the electors qualified to vote for members of the legislature; and in case a majority of the electors so qualified, voting at such election, shall decide in favor of a convention for such purpose, the legislature, at its next session, shall provide by law for the election of delegates to such convention."³

This clause is still in force with slight amendments made in 1894 and 1938.

There have been nine Constitutional Conventions in the history of the State. The last was held in 1967. It received 1,405 proposals for amendment to the 1938 Constitution. The Convention drafted a new Constitution which was defeated at the polls November 7, 1967.⁴

During the period 1821-1966 there were 277 proposals submitted to the people for the holding of Constitutional Conventions or for approval of amendments. Of these ten were proposals for Constitutional Conventions of which six were held. Of the 277 matters voted on, 210 received affirmative votes and the remaining 67 negative.

Between the years 1913 and 1966 there were sixteen separate amendments to the Bill of Rights Article⁵ of the Constitution. Among these (and counted as one amendment) is the general revision voted on as a unit in the 1938 revision.

BILL OF RIGHTS

For the convenience of those who will have to consider this Report, we set out in full Article I of the New York Constitution which embodies the Bill of Rights of the State and comments thereon taken mainly from the paper of the New York State Constitutional Convention Committee, 1938.^{5a}

[Preamble.] WE, THE PEOPLE of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH THIS CONSTITUTION.

³Article XIII, s. 2.

⁴For a description of this Convention see New York Red Book 1967-68, pp. 21-2.

⁵Article I.

^{5a}Vol. VI.

ARTICLE I

Bill of Rights

***[Rights, privileges and franchise secured; power of legislature to dispense with primary elections in certain cases.]** Section 1. No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers, except that the legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general law. (Amended by vote of the people November 3, 1959.)

[Trial by jury; how waived] § 2. Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Freedom of worship; religious liberty.] § 3. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

[Habeas corpus.] § 4. The privilege of a writ or order of habeas corpus shall not be suspended, unless, in case of rebellion

*[Explanatory note. Section headings are enclosed in brackets throughout the constitution to indicate that they are not a part of the official text. Except where otherwise specifically indicated, the section has been re-enacted without change by the Constitutional Convention of 1938 and readopted by vote of the people November 8, 1938.]

or invasion, the public safety requires it. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Bail; fines; punishments; detention of witnesses.] § 5. Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

[Grand jury; protection of certain enumerated rights; duty of public officers to sign waiver of immunity and give testimony; penalty for refusal.] § 6. No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.)

No person shall be deprived of life, liberty or property without due process of law. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 8, 1949; November 3, 1959.)

[Compensation for taking private property; private roads; drainage of agricultural lands.] § 7. (a) Private property shall not be taken for public use without just compensation.

(c) Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceedings, shall be paid by the person to be benefited.

(d) The use of property for the drainage of swamp or agricultural lands is declared to be a public use, and general laws may be passed permitting the owners or occupants of swamp or agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions, on making just compensation, and such compensation together with the cost of such drainage may be assessed wholly or partly, against any property benefited thereby; but no special laws shall be enacted for such purposes. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938. Subdivision (e) repealed by vote of the people November 5, 1963. Subdivision (b) repealed by vote of the people November 3, 1964.)

[Freedom of speech and press; criminal prosecutions for libel.] § 8. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

[Right to assemble and petition; divorce; lotteries; pool-selling and gambling; laws to prevent; pari-mutuel betting on horse races permitted; bingo or lotto authorized under certain restrictions.] § 9. 1. No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid

or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

2. Notwithstanding the foregoing provisions of this section, any city, town or village within the state may by an approving vote of the majority of the qualified electors in such municipality voting on a proposition therefor submitted at a general or special election authorize, subject to state legislative supervision and control, the conduct of specific games of chance, commonly known as bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random. If authorized, such games shall be subject to the following restrictions, among others which may be prescribed by the legislature: only bona fide religious, charitable or non-profit organizations of veterans, volunteer firemen and similar non-profit organizations shall be permitted to conduct such games; the entire net proceeds of any game shall be exclusively devoted to the lawful purposes of such organizations; no single prize shall exceed two hundred and fifty dollars; no series of prizes on any one occasion shall aggregate more than one thousand dollars; no person except a bona fide member of any such organization shall participate in the management or operation of such game; and no person shall receive any remuneration for participating in the management or operation of any such game. The legislature shall pass appropriate laws to effectuate the purposes of this subdivision, ensure that such games are rigidly regulated to prevent commercialized gambling, prevent participation by criminal and other undesirable elements and the diversion of funds from the purposes authorized hereunder and establish a method by which a municipality which has authorized such games may rescind or revoke such authorization. Unless permitted by the legislature, no municipality shall have the power to pass local laws or ordinances relating to such games. Nothing in this section shall prevent the legislature from passing laws more restrictive than any of the provisions of this section. (Amendment approved by vote of the people November 7, 1939; further amended by vote of the people November 5, 1957; November 8, 1966.)

No section 10 (*see footnote**)

*Section 10 which dealt with ownership of lands, allodial tenures and escheats was repealed by amendment approved by vote of the people November 6, 1962.

[**Equal protection of laws; discrimination in civil rights prohibited.**] § 11. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[**Security against unreasonable searches, seizures and interceptions.**] § 12. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

No section 13 (*see footnote**)

[**Common law and acts of the state legislatures.**] § 14. Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated (Formerly § 16. Renumbered and amended by Con-

*Section 13 which dealt with purchase of lands of Indians was repealed by amendment approved by vote of the people November 6, 1962.

stitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

No section 15 (*see footnote**)

[**Damages for injuries causing death.**] § 16. The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation. (Formerly § 18. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[**Labor not a commodity; hours and wages in public work; right to organize and bargain collectively.**] § 17. Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed.

No laborer, workman or mechanic, in the employ of a contractor or subcontractor engaged in the performance of any public work, shall be permitted to work more than eight hours in any day or more than five days in any week, except in cases of extraordinary emergency; nor shall he be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used.

Employees shall have the right to organize and to bargain collectively through representatives of their own choosing. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[**Workmen's compensation.**] § 18. Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefore shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the

*Section 15 which dealt with certain grants of lands and of charters made by the king of Great Britain and the state and obligations and contracts not to be impaired was repealed by amendment approved by vote of the people November 6, 1962.

amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer. (Formerly § 19. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

COMMENTS

Section 1

The Franchise

Article I, Section 1 has its source in Article XIII of the Constitution of 1777 which reads as follows:

"XIII . . . No member of this State shall be disfranchised, or deprived of any rights or privileges secured *to the subjects of this state* by this Constitution, unless by the law of the land, or the judgment of his peers."

In the 1821 Constitution in altered form it appears as Article VII, Section 1 and reads as follows:

"No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by law of the land, or the judgment of his peers."

This Section was adopted unchanged in the 1846 Constitution as Article I, Section 1, remained in the 1894 Constitution as Article I, Section 1, and was re-enacted in the 1938 Revision without change until the amendment of 1959.

The New York State Constitutional Convention Committee of 1938 observes that this is in substance the 39th article of Magna Charta.

The phrase "law of the land" has been held to be synonymous with the words "due process of law".

Section 2

Trial by Jury

Section 2 has its source in the Constitution of 1777, Article XLI which reads as follows:

". . . trial by jury, in all cases in which it *hath* heretofore been used in the colony of New York, shall be established, and remain inviolate forever . . ."

In the 1821 Constitution the wording was slightly modified in Article VII, s. 2 as follows:

"The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever . . ."

The Constitution of 1846 amended the provision to permit waiver in civil cases. Article I, section 2 of that Constitution is identical with that of 1821 as quoted with the following addition:

"But a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law."

This provision was retained as Article I, section 2 in the 1894 Constitution but was amended in 1935 to allow non-unanimous jury verdicts in civil cases and in 1937 to permit defendants in all criminal cases, except those in which the crime charged may be punishable by death, to waive trial by jury. The Article as amended reads as follows:

"The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever, but a jury trial may be waived in the manner to be prescribed by law by the parties in all civil cases and by the defendant in all criminal cases, except those in which the crime charged may be punishable by death. The legislature may provide, however, by law, that a verdict may be rendered by not less than 5/6ths of the jurymen constituting a jury in any civil case."

The 1938 revision altered this provision by substituting the word "guaranteed" for "used" in the first sentence and by providing for a form for the waiver in criminal cases.

The jury had its origin in the Norman institution known as an inquest. The process gradually changed from a group of people selected because they knew the facts to a body of people to determine facts solely on the basis of the evidence.

The main problems encountered in New York State with regard to section 2 are as follows:

- (1) number of jurors
- (2) alternate jurors
- (3) waiver
- (4) relation of judge to jury
- (5) requirement of unanimity of verdict
- (6) selection of jurors
- (7) extent of right to be tried by jury
- (8) proposal for abolition or restriction in scope.⁸

⁸For an analysis of these problems see New York State Constitutional Convention Committee, 1938, Vol. VI, pp. 10-26.

Section 3

Religious Freedom

Section 3 has its source in Article XXXVIII of the 1777 Constitution which reads as follows:

“And whereas, we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind; this convention doth further, in the name and by the authority of the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this state to all mankind; *provided*, That the liberty of conscience hereby granted shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.”

It is noted in the 1938 Convention's working papers⁷ that this provision was limited by other constitutional provisions and judicial decisions.

In most cases witnesses until 1846 were not permitted to testify unless they professed a belief in the existence of the Supreme Being and in a future or present state of punishment and rewards.⁸

By virtue of Article XXXIX of the 1777 Constitution and Article VII, s. 4 of the 1821 Constitution, ministers and priests were ineligible to hold civil or military office.

The provision for religious freedom in Article VII, s. 3 of the 1821 Constitution provided:

“The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state, to all mankind; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of this state.”

In the 1846 Constitution the disability of ministers and priests to testify as witnesses was removed and they were made competent to be witnesses regardless of religious belief.⁹

⁷*Ibid.*, 27.

⁸*Jackson v. Gridley*, 18 Johns. 98.

⁹See Constitution Article 1, s. 3 for the wording which has continued through Article 1, s. 3 of the 1894 Constitution to the present time.

For judicial interpretations see New York State Constitutional Convention Committee, 1938, Vol. VI, pp. 28-36.

Section 4

Habeas Corpus

The source of this section was in the Constitution of 1821 (the first New York Constitution after the Federal Constitution) Article VII, s. 6 which provided as follows:

"The privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require its suspension."

This provision continued unchanged through the Constitution of 1846 as Article 1, section 4, (except for the pluralization of the word "case") and the Constitution of 1894, Article 1, section 4.

The 1938 Convention adopted an amendment rewording the section and adding "or order" after the word "writ".¹⁰

The writ of habeas corpus is among the oldest of the civil rights claimed by the Anglo-Saxons and was regarded as a fundamental part of the English common law by the time of Coke. The writ was reaffirmed in the Petition of Right and finally enacted in the Habeas Corpus Act of 1679. It has been regarded as a guaranty of a right to trial and protection from detention without trial and also as furnishing a legal procedure through which the legality of detention and processes of securing detention can be tested. It is considered a bulwark against imprisonment without "due process of law".

The problems cited by the authors of the 1938 Constitutional Convention Committee's working paper on the Bill of Rights.¹¹ are:

- (1) the suspension of the writ in certain circumstances;
- (2) the manner in which the privilege has actually functioned.

These problems are discussed generally in this working paper.¹²

Section 5

Bail, Fines and Punishment

This section as presently constituted¹³ was first inserted in the Constitution in 1846 as Article 1, s. 5 and continued without change in the Constitution of 1894, Article 1, s. 5. The section did not undergo revision in 1938.

The first 3 clauses of the section were part of the English Declaration of Rights of 1689 and were first incorporated by the Legislature of New York in 1787 in "An Act Relating to the Right

¹⁰See Article 1, s. 4, p. 1628, *supra*.

¹¹New York State Constitutional Convention Committee, 1938, Vol. VI, p. 38.

¹²*Ibid.*, 38-52.

¹³See p. 1629, *supra*.

of Citizens". The clauses were included in the 1846 Constitution, as noted above, when the clause relating to detention of witnesses was added.¹⁴

Section 6

Indictment

This section did not appear in the 1777 Constitution but was adopted in the 1821 Constitution, Article VII, s. 7, reading in part as follows:

"No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which this State may help with the consent of Congress in time of peace, and in cases of petit larceny, under the regulation of the Legislature), unless on presentment or indictment of a grand jury . . ."

This provision on indictment continued unchanged in the Constitution of 1846¹⁵ and in the 1894 Constitution.¹⁶

The 1938 revision made the following changes to the indictment provision:

"No person shall be held to answer for a capital or otherwise infamous crime (except in the cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this State may help with the consent of Congress in time of peace, and in cases of petit larceny, under the regulation of the Legislature), unless on indictment of a grand jury . . ."

The grand jury originated in the Norman institution of inquest. The grand jury served to guarantee an individual against unjust prosecution without sufficient cause. An indictment serves to assure that there is reasonable cause for prosecution and informs the defendant of the nature of the charge against him permitting him to prepare a defense. It also defines the crime in order that he may plead the verdict as a defense to a second prosecution for the same crime.

In New York the first statutory enactment guaranteeing the right of an accused to be proceeded against only by indictment came in 1683 in the Charter of Liberties and Privileges for the colony of New York. It reads as follows:

"That in all cases capital or criminal there shall be a grand Inquest who shall first present the offense and then twelve men of

¹⁴For a discussion of the section see New York State Constitutional Convention Committee, 1938, Vol. VI, pp. 53-66.

¹⁵Article I, s. 6.

¹⁶Article I, s. 6.

the neighbourhood to try the offender who, after his plea to the indictment, shall be allowed his reasonable challenge."

The Fifth Amendment to the Federal Constitution providing for indictment and the Fourteenth Amendment "due process" clause have been held not to interfere with the power of the states to deal with the subject of indictment. (But the "equal protection" clause of the Fourteenth Amendment will forbid discrimination by state legislatures on the ground of race, creed or color in the selection of grand juries.¹⁷

The problems with the provisions as outlined and discussed in the working paper of the 1938 Constitutional Convention Committee¹⁸ are as follows:

- (1) form of the indictment;
- (2) waiver of indictment. (Note: an amendment permitting waiver of indictment was proposed by the 1915 Constitutional Convention but was not adopted as the whole proposed Constitution was defeated at the polls.);
- (3) extent of the right to be proceeded against by indictment;
- (4) proposals for its abolition and the substitution of other procedures.

Right to Appear and Defend

This provision first appeared in Article VII, s. 7 of the 1821 Constitution as follows:

"... and in every trial on impeachment or indictment the party accused shall be allowed counsel, as in civil actions . . ."

The provision was amended in the Constitution of 1846 guaranteeing the right in "any court whatever" as the trial on "impeachment or indictment" did not include courts martial.¹⁹

The portion of the 1846 Constitution relating to right to appear and defend reads as follows:

"... and in any trial in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions . . ."²⁰

This provision remained unchanged in Article 1, s. 6 of the 1894 Constitution but was amended in the 1938 Revision by adding,

"and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him."

¹⁷*Norris v. Ala.* 294 U.S. 587 (1935).

¹⁸New York State Constitutional Convention Committee, 1938, Vol. VI, pp. 68-74.

¹⁹*Rathbun v. Sawyer* 15 Wend. 451 (1836).

²⁰Article 1, s. 6.

The substance of the provision is considered one of the essential guarantees of the "due process of law". The failure of a state to accord a defendant a right to counsel at least in capital or other serious crimes will constitute a violation of the "due process" clause of the Federal Fourteenth Amendment.²¹

Double Jeopardy

This provision as originally included in the 1821 Constitution, Article VII, s. 7 reads as follows:

"No person shall be subject for the same offense, to be twice put in jeopardy of life or limb . . ."

In the 1846 Constitution, Article I, the provision was amended to read:

"No person shall be subject to be twice put in jeopardy for the same offense . . ."²²

The provision has remained the same through the 1894 Constitution to the present.

There was no plea of double jeopardy at common law, but Blackstone stated the principle as follows:

"The plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into *jeopardy of his life* more than once for the same offense. And, hence it is allowed as a consequence that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offense, he may plead such acquittal in bar of any subsequent prosecution for the same crime." (Blackstone: *Commentaries* 335.)

The guarantee in those state constitutions containing provisions relating to jeopardy and the Federal Constitution, is not limited to felony cases (as was Blackstone's statement) and extends the basis of the plea of former acquittal beyond a jury verdict of not guilty.

The 1938 Constitutional Convention Committee's working paper examines problems relating to the section.²³

²¹*Gideon v. Wainwright* (1963) 372 U.S. 335. For a general discussion of the interpretation given to the provision see New York State Constitutional Convention Committee, 1938, Vol. VI, p. 76.

²²See s. 6.

²³New York State Constitutional Convention Committee, 1938, Vol. VI, pp. 78-104.

Self-Incrimination

In Article VII, s. 7 of the 1821 Constitution the provision read:

" . . . nor shall he be compelled in any criminal case, to be a witness against himself . . ."

The provision continued unaltered through the 1846 Constitution²⁴ and the 1894 Constitution.²⁵

It was amended in the 1938 revision to provide for removal of public officers for failure to testify before grand juries and to provide for the preservation of the power of grand juries. In 1949 the provision was further amended to establish an additional penalty for refusal of public officers to waive immunity or give testimony and in 1959 it was further amended relative to the prohibition against the holding of office by a public official if he refuses to testify concerning his conduct in office.

Due Process

The 1821 Constitution provided as follows:

" . . . nor be deprived of life, liberty, or property without due process of law . . ."²⁶

This provision remained unchanged through the 1846 Constitution,²⁷ the 1894 Constitution²⁸ and in the 1938 revision to the present.

Section 7

Compensation for Taking Private Property

Provision for no expropriation without compensation was first introduced in the 1821 Constitution.²⁹

It has continued unchanged through the 1846 Constitution,³⁰ the 1894 Constitution³¹ and in the 1938 Revision.³²

The 1938 Constitutional Convention Committee in its working paper³³ points out that the provision was probably borrowed

²⁴Article I, s. 6.

²⁵Article I, s. 6.

²⁶Article VII, s. 7.

²⁷Article I, s. 6.

²⁸Article I, s. 6.

²⁹Article VII, s. 7.

³⁰Part of Article I, s. 6.

³¹Article I, s. 6.

³²Article I, s. 7.

³³New York State Constitutional Convention Committee, 1938, Vol. VI, p. 106.

from the Fifth Amendment of the United States Constitution. It cites the case of *Polly v. Saratoga, etc. R.R. Co.*³⁴ that "the constitutional prohibition was merely declaratory of the existing law."

Several court decisions before 1821 had treated the principle as one of natural justice that was as binding and obligatory on the Legislature as though incorporated into the written Constitution.

In the case of *People v. Priest*³⁵ the situation before 1821 was discussed and it was pointed out that the right was reserved by the Constitution of 1777 (s. 13) in the provision "no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to the subjects of this State by this Constitution, unless by the law of the land or the judgment of his peers." This is based on a provision in Chapter 39 of Magna Charta, and was secured by s. 35 of the 1777 Constitution which incorporated into the law so much of the English common law and the Acts of the Legislature of the colony of New York as together formed the law of the colony as of April 19, 1775.

Proposals for amendment, none of which was adopted were made in 1894, 1914, 1915 and 1919. Generally, these amendments were designed to permit eminent domain proceedings for water power development and electric transmission lines; to include the cost of proceedings in the compensation; to prohibit the enactment of legislation to cure jurisdictional defects in proceedings affecting title to property; to require payment of compensation (to be fixed by the court) before the taking.

In the discussion, the problem of defining a taking for "public use" which is constitutional, as opposed to a "private use" which is unconstitutional and void is dealt with. The decision whether the use is public or private is a matter of judicial discretion. The expression "taking of property" has been held to mean any use that affects the free use and enjoyment or power of disposition at the will of the owner.

Section 7(b) of the 1938 Revision deals with the tribunals for ascertaining compensation when not made by the State. It originated in the 1846 Constitution and underwent numerous amendments until repealed by vote of the people, 1964.

Section 7(c) has remained unaltered since its introduction into the 1846 Constitution³⁶ and continued in the 1894 Constitution.³⁷

It apparently was enacted as a result of a decision of the Supreme Court in *Taylor v. Porter*³⁸ declaring that there was no

³⁴(1852) 9 Barbour 449, 459.

³⁵(1912) 206 N.Y. 274.

³⁶Part of Article I, s. 7.

³⁷Part of Article I, s. 7.

³⁸(1843) 4 Hill 140.

law to authorize the construction of private roads and bridges. In that case a statute was declared unconstitutional which provided for the laying of private roads. The effect of the proceeding was to transfer the property of one person to another, a deprivation of property without due process of law as it was a taking for a private use.

The background of the insertion is discussed in *In Re Tut-hill*.³⁹

"The provision for the opening of private roads represented a public policy dating from 1772, when the first statute upon the subject was enacted. The statute continued in full and active operation as the law of the State upon the adoption of our Constitution in 1777, which contained such parts of the common law in force as had formed part of the law of the colony. It was embodied in the Revised Statutes [declared unconstitutional in *Taylor v. Porter*] and then, in 1846, was added to the Constitution. It was an evident public policy of the State, long acquiesced in, that facilities should be furnished for private ways, so that the property of citizens might be made accessible."⁴⁰

In the 1867 Convention a resolution was lost which proposed to strike out the section as deprivation of property without due process of law. In 1910 the Legislature unsuccessfully attempted to amend the section by altering the phraseology by striking out "the amount of".

The section has been interpreted to permit the Legislature to provide for the right of appeal as it sees fit but not to dispense with the constitutional tribunal designated.⁴¹

Section 7(d) was adopted in the Constitution of 1894⁴² as follows:

"General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes."

In 1919 it was amended and the present wording adopted.

An attempt had been made in the Constitution of 1867 to adopt a similar provision but that Constitution was rejected by the people. The Commission of 1872 unsuccessfully attempted to introduce a broader provision than that of 1867.

Up to the time of adoption of this provision in the Constitution, the courts had held that drainage laws authorizing the con-

³⁹ (1900) 163 N.Y. 133 at p. 140.

⁴⁰ New York State Constitutional Convention Committee, 1938, Vol. VI, p. 139.

⁴¹ *Ibid.*, 140.

⁴² Part of Article I, s. 7.

demnation of private property to drain private premises were unconstitutional unless necessary for the public health.

A flurry of amendments was proposed between 1894 and 1919. In 1894 it was proposed and rejected that necessary use of land for the construction and operation of works serving to retain, exclude, or convey water for agricultural, mining, milling, domestic or sanitary purposes be declared a public use. Also in 1894 it was proposed that dams and reservoirs could be constructed for the development of water power on private land taken for the purpose. In 1909 the Legislature attempted to add a provision declaring drainage of private land to be a public use, that just compensation be made and expenses assessed against the persons or property benefited. In 1910 a similar proposal was made. In 1913 it was proposed by the Legislature that drainage of private land be made a public use and that the necessity of drainage and the damage sustained be determined by a jury or three or more commissioners appointed by a court of record and paid by those benefited.

In the convention of 1915 the drainage of swamps and the special laws prohibition were added. The 1919 Legislature's amendment was much the same as the 1915 proposal and was accepted by the people. It expressly declares the drainage to be a "public use".

Section 7(2) permitting the Legislature to authorize cities and counties to take more land than necessary for the construction, laying out, widening, extending or relocating parks, public places, highways or streets and permitting the sale of the excess was repealed in 1963.

The provision had been adopted in 1913 and amended in 1927 to include counties. It was judicially interpreted not to permit a separate condemnation proceeding at a later date.

Section 8

Freedom of Speech

This provision originated in the Constitution of 1821,⁴³ where the word "criminal" was omitted before "prosecutions". It was continued without change except for the addition of the word "criminal" in the 1846 Constitution,⁴⁴ and the 1894 Constitution.⁴⁵

The first victory in abolition of censorship of the press was achieved in England in 1695 and in the colonies in 1725 followed by the trial of Peter Zinger in 1735 (U.S.) and Fox's Libel Act 1792 (England). Guarantees of freedom of speech and assembly and press were incorporated in the first amendment to the federal constitution on the insistence of several of the states.

⁴³Article VII, s. 8.

⁴⁴Article I, s. 8.

⁴⁵Article I, s. 8.

The scope of the provision has always been a problem. This is fully discussed in the Constitutional Convention Committee's working paper.⁴⁶

Section 9

Right to Assemble and Petition the Government, Etc.

This section is a polygot one, dealing as it does with such unrelated subjects as the right to assemble and petition the government, divorce, lotteries, pool-selling, betting on horse races and bingo. This provision dealing with the right of assembly originated in the 1846 Constitution.⁴⁷ It continued without change in the 1894 Constitution⁴⁸ and was unchanged in the 1938 Revision.

The part of the section dealing with right of assembly is closely related to Freedom of Speech and is discussed in the 1938 Constitutional Convention's working paper.⁴⁹

Divorce Only by Due Judicial Proceedings

This part of the section was adopted in the 1846 Constitution⁵⁰ and continued without change in the Constitution of 1894⁶¹ and was unchanged in the 1938 Revision.

Since the law of England on divorce was largely ecclesiastical it did not become part of the law of New York. In 1787 an Act was passed vesting jurisdiction in the state Court of Chancery over divorce. Prior to that, the sole method of obtaining dissolution was an appeal to the Colonial Governor or Legislature. The purpose of the section apparently was to safeguard against special legislative dispensation of divorces.

It is assumed that the phrase "judicial proceedings" may be defined as proceedings in a court of justice established or recognized by the Constitution. Divorces granted by religious authority are invalidated.

Lotteries

The Constitution of 1821⁶² provided as follows:

"No lottery shall hereafter be authorized in this state; and the legislature shall pass laws to prevent the sale of all lottery tickets within this State, except in lotteries already provided for by law."

⁴⁶New York State Constitutional Convention Committee, 1938, Vol. VI, pp. 150-184.

⁴⁷Part of Article I, s. 10.

⁴⁸Part of Article I, s. 9.

⁴⁹New York State Constitutional Convention Committee, 1938, Vol. VI, p. 154ff.

⁵⁰Part of Article I, s. 10.

⁶¹Part of Article I, s. 9.

⁶²Article VII, s. 11.

The Constitution of 1846⁵³ provided in part:

"... nor shall any lottery hereafter be authorized, or any sale of lottery tickets allowed within this state."

The Constitution of 1894⁵⁴ provided in part:

"... nor shall any lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling hereafter be authorized or allowed within this state, and the Legislature shall pass appropriate laws to prevent offences against any of the provisions of this section."

The provision remained unchanged in the Constitution of 1938 but was amended in 1939 to permit *pari-mutuel* betting on horse races, in 1957 to authorize the conduct of bingo games by certain organizations under state regulation and local government supervision and in 1966 to authorize state lotteries for the support of education in the state.

Section 10

Land Tenure

The section, before repeal in 1962, read:

"The people of the state in their right of sovereignty, possess the original and ultimate property in and to all lands within the jurisdiction of the state. All lands shall ever remain allodial so that the entire and absolute property is vested in the owners according to the nature of their respective estates. All lands the title to which shall fail, from a defect of heirs, shall revert or escheat to the people."

The section had originated in the Constitution of 1846,⁵⁵ to have the question of feudal tenures fixed beyond the power of one Legislature as a great battle was being waged in the manorial districts by the "anti-renters". The feudal tenures even at that time had been legislated out of existence.

The provision for "sovereignty" and "escheats" was merely declaratory of the law on succession from The King.

Attempts were made in 1894 and 1915 to add to this section a provision abolishing dower, but they were unsuccessful.

The section had been considered since its inception, constitutionally unimportant. The principle of allodial tenures had been adopted legislatively by that time and the right of escheat to the people has always been thought to be an inherent right in the state.

⁵³Article I, s. 10.

⁵⁴Article I, s. 9.

⁵⁵Article I, ss. 11 and 13.

Section 11

Equal Protection of Laws, No Discrimination

This was a new section adopted by the convention of 1938.

The purpose of the amendment was to extend the protection given against discrimination provided by the Fourteenth and Fifteenth Amendments and to transfer the substance of certain anti-discriminatory statutes into the Constitution.

The working paper of the 1938 Constitutional Convention Committee⁵⁶ discusses the scope and purpose of the amendment.

Section 12

Security Against Searches and Seizures

This is a new section, adopted by the Constitutional Convention of 1938. Prior to that time a guarantee against unreasonable searches and seizures was contained in a statute.⁵⁷ A full historical discussion is contained in the working paper of the 1938 Constitutional Convention Committee.⁵⁸

Section 13

Purchase of Land From the Indians

This section prior to its repeal in 1962 read:

"No purchase or contract for the sale of lands in this state, made since the 14th day of October 1775, or which may hereafter be made of or with the Indians, shall be valid unless made under the authority and with the consent of the legislature."

The section was originally derived from the 1777 Constitution, Article XXXVII.

As early as 1684 an Act of New York recognized the prior title to land of the Indians. Friendly relations with the Indians was of prime concern to the early colonists.

Section 14

Common Law and Early Acts of the Legislature

The section was derived from the Constitution of 1777, Article XXXV which read as follows:

"And this convention doth . . . declare that such parts of the common law of England, and of the statute law of England and

⁵⁶New York State Constitutional Convention Committee, 1938, Vol. VI, pp. 221-227.

⁵⁷Civil Rights Law, s. 8, c. 6, Consolidated Laws of New York enacted by Laws 1909, c. 14.

⁵⁸New York State Constitutional Convention Committee, 1938, Vol. VI, pp. 215-220.

Great Britain, and of the acts of legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this state, subject to such alterations and provisions as the legislature of the state shall, from time to time, make concerning the same. That such of said acts as are temporary shall expire at the times limited for their duration respectively. That all such parts of the said common law, and all such of the said statutes and acts aforesaid, or parts thereof, as may be construed to establish or maintain any particular denomination of Christians or their ministers, or concern the allegiance heretofore yielded to, and the supremacy, sovereignty, government, or prerogatives claimed or exercised by, the King of Great Britain and his predecessors, over the colony of New York and its inhabitants, or are repugnant to this Constitution, be and they hereby are, abrogated and rejected. And this convention doth further ordain, That the resolves or resolutions of the Congresses of the colony of New York, and of the convention of the state of New York, now in force, and not repugnant to the government established by this Constitution, shall be considered as making part of the laws of this state; subject nevertheless, to such alterations and provisions as the legislature of this state may, from time to time, make concerning the same."

The section as it presently is constituted⁵⁹ was first adopted in the Constitution of 1821, Article VII, s.13 and continued in the Constitution of 1846, Article I, s.17 (where provision was also made for a body of three commissioners to codify the law) and in the Constitution of 1894, Article I, s.16.

It has been held that the section does not compel the incorporation into the system of jurisprudence in New York, principles inapplicable to the new circumstances or inconsistent with notions of "what a just consideration of those circumstances demands."⁶⁰ For example, the English law of waters does not obtain, although rights of riparian owners is largely the same.

Section 15

Grants of Land Made by the King of Great Britain

This section prior to its repeal in 1962 read:

"All grants of land within this State, made by the King of Great Britain or persons acting under his authority, after the 14th day of October, one thousand seven hundred seventy-five, shall be null and void; but nothing contained in this Constitution shall affect any grants of land within this State, made by the authority of

⁵⁹Except that the word "and" which formerly preceded the words "seventy-five" and "seventy-seven" was omitted in the 1938 Revision.

⁶⁰*Brookhaven v. Smith* (1907) 188 N.Y. 74.

the said King or his predecessors, or shall annul any charters to bodies politic and corporate by him or them made before that day; or shall affect any such grants or charters since made by this State, or by persons acting under its authority; or shall impair the obligation of any debts, contracted by the State, or individuals, or bodies corporate, or any other rights of property, or any suits, actions, rights of action, or other proceedings, in courts of justice."

The section had its origin in the Constitution of 1777.⁶¹

Royal and State Charters

It is agreed that the provision when enacted by the 1894 Constitution providing that "nothing in the Constitution should annul charters made since 1775 by the State" in respect of the years 1846-1894 is a nullity and has continued to be, as other sections of the 1846 Constitution affected the grants of charters.

It had been judicially decided that the provision was not a restraint on legislative power but "the Constitution itself shall not annul such charters"¹

Section 16

Damages for Injuries Causing Death

This section was formerly Article I, section 18 of the 1894 Constitution. It was renumbered but otherwise unchanged in the 1938 Revision.

Section 17

Rights of Labour

This section was adopted in the 1938 Revision.

Section 18

Workmen's Compensation

This section was added to the 1894 Constitution in 1913⁶² and carried into the 1938 Constitution without change except as to renumbering.

It was proposed as a result of the decision of the Court of Appeals in *Ives v. South Buffalo R. Co.*⁶³ which held that the Workmen's Compensation Act of 1910 was unconstitutional.

⁶¹Article XXXVI.

⁶²Article I, s. 19.

⁶³1911, 201 N.Y. 271, 94 N.E. 431, Ann. Cas. 1912 XB, 156.

APPENDIX "C" TO SECTION 3

The Saskatchewan Bill of Rights¹

CHAPTER 378.

An Act to protect Certain Civil Rights.

Her Majesty, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

1. This Act may be cited as *The Saskatchewan Bill of Rights Act*.

2. In this Act "creed" means religious creed. R.S.S. 1953, c. 345, s. 2.

3. Every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief, and freedom of religious association, teaching, practice and worship. R.S.S. 1953, c. 345, s. 3.

4. Every person and every class of person shall, under the law, enjoy the right to freedom of expression through all means of communications, including speech, the press, radio and the arts. R.S.S. 1953, c. 345, s. 4.

5. Every person and every class of persons shall enjoy the right to peaceable assembly with others and to form with others associations of any character under the law R.S.S. 1953, c. 354, s. 5.

6. Every person and every class of persons shall enjoy the right to freedom from arbitrary arrest or detention, and every person who is arrested or detained shall enjoy the right to an immediate judicial determination of the legality of his detention and to notice of the charges on which he is detained. R.S.S. 1953, c. 345, s. 6.

7. Every qualified voter resident in Saskatchewan shall enjoy the right to exercise freely his franchise in all elections and shall possess the right to require that no Legislative Assembly shall continue for a period in excess of five years. R.S.S. 1953, c. 345, s. 7.

¹R.S.S. 1965, c. 378.

8. Every person and every class of persons shall enjoy the right to engage in and carry on any occupation, business or enterprise under the law without discrimination because of the race, creed, religion, colour or ethnic or national origin of such person or class of persons. R.S.S. 1953, c. 345, s. 9.

9. Every person and every class of persons shall enjoy the right to acquire by purchase, to own in fee simple or otherwise, to lease, rent and to occupy any lands, messuages, tenements or hereditaments, corporeal or incorporeal, of every nature and description, and every estate or interest therein, whether legal or equitable, without discrimination because of the race, creed, religion, colour or ethnic or national origin of such person or class of persons. R.S.S. 1953, c. 345, s. 10.

10. Every person and every class of persons shall enjoy the right to membership in and all of the benefits appertaining to membership in every professional society or other occupational organization without discrimination because of the race, creed, religion, colour or ethnic or national origin of such person or class of persons. R.S.S. 1953, c. 345, s. 12; 1956, c. 67, s. 3.

11.—(1) Every person and every class of persons shall enjoy the right to education in any school, college, university or other institution or place of learning, vocational training or apprenticeship without discrimination because of the race, creed, religion, colour or ethnic or national origin of such person or class of persons.

(2) Nothing in subsection (1) prevents a school, college, university or other institution or place of learning that enrolls persons of a particular creed or religion exclusively, or that is conducted by a religious order or society, from continuing its policy with respect to such enrolment. R.S.S. 1953, c. 345, s. 13.

12.—(1) No person shall publish, display or cause or permit to be published or displayed on any lands or premises or in a newspaper, through a radio broadcasting station, or by means of any other medium that he owns, controls, distributes or sells, any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive, abridge or otherwise restrict, because of the race, creed, religion, colour or ethnic or national origin of any person or class of persons, the enjoyment by any such person or class of persons of any right to which he or it is entitled under the law.

(2) Nothing in subsection (1) restricts the right to freedom of speech under the law, upon any subject. R.S.S. 1953, c. 345, s. 14.

13.—(1) Every person who deprives, abridges or otherwise restricts or attempts to deprive, abridge or otherwise restrict any person or class of persons in the enjoyment of a right under this

Act or who contravenes any provision thereof is guilty of an offence, and liable on summary conviction to a fine of not less than \$25 nor more than \$50 for the first offence, and not less than \$50 nor more than \$200 for a subsequent offence, and in default of payment to imprisonment for not more than three months.

(2) The penalties provided by this section may be enforced upon the information of any person alleging on behalf of himself or of any class of persons that a right that he or any class of persons or a member of any such class of persons is entitled to enjoy under this Act has been denied, abridged or restricted. R.S.S. 1953, c. 345, s. 15.

14. Every person who deprives, abridges or otherwise restricts or attempts to deprive, abridge or otherwise restrict any person or class of persons in the enjoyment of:

(a) a right under section 3, 4, 5, 6 or 7; or

(b) a right under section 8, 9, 10 or 11 because of the race, creed, religion, colour or ethnic or national origin of such person or class of persons;

may be restrained by an injunction issued in an action in the Court of Queen's Bench brought by any person against the person responsible for such deprivation, abridgement or other restriction, or any attempt thereat. R.S.S. 1953, c. 345, s. 16; 1956, c. 67, s. 4.

15. This Act binds the Crown and every servant and agent of the Crown. R.S.S. 1953, c. 345, s. 17.

16. Except as herein expressly provided nothing in this Act derogates from any right, freedom or liberty to which any person or class of persons is entitled under the law. R.S.S. 1953, c. 345, s. 18.

Consolidated Summary of Recommendations

(Continued)

Recommendations 1-559 appear in Report Number 1,
Vol. 3, pp. 1257 *ff.*

Part IV

VOLUME 4

GENERAL SAFEGUARDS AGAINST UNJUSTIFIED ENCROACHMENTS OR INFRINGEMENTS ON THE RIGHTS OF THE INDIVIDUAL

Ombudsman or Parliamentary Commissioner

General

560. The creation of the office of Parliamentary Commissioner or Ombudsman should not be considered as a substitute for a proper legal framework which provides adequate substantive and procedural safeguards for the rights of the individual. (p. 1405)

Local Government

561. A Commissioner or Ombudsman for local government with powers similar to the Parliamentary Commissioner in New Zealand should be appointed by the Lieutenant Governor in Council in each municipal region on the request of local governments within a region representing 50% of the population of a region. (p. 1405)

Provincial Government

562. When effective legislation has been enacted and become operative to provide the substantive and procedural safeguards for the rights of the individual recommended in Report Number 1, the situation in Ontario should be reviewed and consideration should be given in the

light of experience gained to the establishment of a bureau to be presided over by a Commissioner appointed by the Legislature with powers similar to those of the Parliamentary Commissioner of New Zealand to consider complaints with regard to maladministration in provincial government affairs, including alleged conflict of interest. (p. 1405)

563. The office if created should not be designed to diminish or circumscribe any of the duties of members of the Legislature or their rights to make inquiries and to submit questions to Ministers. (p. 1406)
564. The rights of review and appeal to the courts should not be interfered with by the creation of such an office. (p. 1406)
565. The holder of the office should not have any jurisdiction over the ordinary courts or the judiciary. (p. 1406)
566. In no case should the Commissioner have the powers of the Swedish Ombudsman with regard to prosecution nor should he have power to prosecute any government officials. (p. 1406)
567. If the office is established definite procedural rules should be laid down for the exercise of the Commissioner's powers. (p. 1406)
568. Members of the public should have the right to file their complaints directly with the Commissioner. (p. 1406)
569. The person against whom a complaint is made should be promptly notified and the head of the relevant government department and the Prime Minister's office should be advised of any investigation undertaken. (p. 1406)
570. There should be no publicity with respect to complaints made to the Commissioner and neither complaints made nor proceedings before the Commissioner should be open to public inspection. (p. 1406)

Complaints Concerning the Administration of Justice

COMPLAINTS CONCERNING THE COURTS

Judicial Council

571. A special Judicial Council should be created on the pattern of the Danish Court of Complaints to receive specific complaints of citizens concerning the manner in which justice is administered in the Supreme and county and district courts and maladministration in those courts. (p. 1406)
572. The Judicial Council should be composed as follows:
- The Chief Justice of Ontario
 - The Chief Justice of the High Court
 - The senior member of the Supreme Court by order of his appointment to the Court
 - The Chief Judge of the County and District Courts
 - A district or county court judge designated by the Chief Judge of the County and District Courts.
- (p. 1406-07)
573. The Judicial Council should not impinge on the authority of the Attorney General with respect to provincial servants appointed to perform administrative duties in the process of the courts. (p. 1407)
574. Proper rules for investigations by the Judicial Council should be adopted to safeguard the rights of judges who may be affected. No publicity should be given to the proceedings. (p. 1407)

Costs Incurred through Judicial Error

575. The Court of Appeal should be given a discretionary power upon notice to the Attorney General upon disposition of an appeal in a civil or criminal case to direct that all costs incurred in the case be paid in whole or in part by the provincial government where it finds that the trial judge has misconducted the trial or where there is obvious error. (p. 1407)

FRENCH ADMINISTRATIVE COURTS

Conseil d'Etat

576. A system of administrative courts patterned on the French system should not be adopted in Ontario. (p. 1472)

Material on Judicial Review

577. A court hearing an application for judicial review should be given power to require the tribunal whose decision is under review to produce for the information of the court all documents and material which it had before it or considered in relation to the decision. (pp. 1472-73)

Legislative Changes in Government Contracts

578. The Ontario Law Reform Commission should be asked to consider what changes in the law should be made to give the courts power to grant relief against hardships where legislative changes have terminated or frustrated contracts made with public authorities, in whole or in part, or made them more difficult of performance than could have been reasonably anticipated when the contract was entered into. (p. 1473)

A Bill of Rights for Ontario

Principles of a Bill of Rights

579. A Bill of Rights should first be considered for the persuasive and rational impact it will make on the ordering of society and not for its authoritative form. (p. 1607)
580. The consideration of a Bill of Rights should take into account that the highest recognition of the equality and final worth of human individuals in the realm of politics and law is the right of each to vote on the basis of universal adult suffrage in periodic and free elections, where the constituencies are so arranged by population that one man's vote is substantially as great in influence as another's. (p. 1608)
581. A philosophy of government should not be adopted which deprives the people of the ultimate right to determine their own social affairs through democratic processes and transfers the final power of decision in certain areas to appointed officials—the judges. (p. 1608)
582. The modern democratic Canadian Parliament and Legislatures should be considered to be superior to the courts in their title to primacy in major decisions of social policy. Parliamentary bodies have the matching institutional design and procedure. (p. 1608)
583. It would be unwise for a government to lock itself into a constitutional strait-jacket where the making of new laws to meet changing social conditions would be made almost impossible by reason of the difficulty in obtaining relief through amendment to the constitution. (p. 1608)

Federal Bill of Rights

584. The entrenchment of a national Bill of Rights should not be considered until a flexible amending procedure for the constitution is decided upon. (p. 1608)

585. Ontario should not compromise the areas of legislative jurisdiction that it now enjoys by agreeing to constitutional entrenchment of a national Bill of Rights. If there is to be a readjustment of subjects between the federal and provincial governments it should be by express agreement and not indirectly through the entrenchment of a Bill of Rights. (p. 1608)

Entrenchment of a Provincial Bill of Rights

586. Full consideration should be given to the grave doubts that exist as to whether the Province of Ontario could entrench a Provincial Bill of Rights by enacting a statute passed by ordinary majority which could only be amended or repealed by a statute passed by a greater majority than an ordinary majority. (pp. 1608-09)
587. Even if Ontario could entrench a Provincial Bill of Rights by a statute passed by an ordinary majority which would require more than an ordinary majority of those voting in the Legislature to repeal or amend it, this should not be done. It is wrong in principle for one parliament to seek to bind a succeeding parliament and the new class of voters electing that parliament. (p. 1609)
588. In any case if entrenchment of a Bill of Rights is considered feasible it should be confined to the definition of the individual rights which themselves are the foundation of parliamentary democracy and these should be expressed in carefully qualified terms. (p. 1609)

A Statutory Provincial Bill of Rights

589. The Province should adopt a Bill of Rights enacted in ordinary statutory form as was done in Saskatchewan. (p. 1609)
590. The statute should declare in appropriate language the following rights and freedoms which are the foundations of parliamentary democracy:

- (1) The right of every person to freedom of conscience and religion.
- (2) The right of every person to freedom of thought, expression and communication.
- (3) The right of every person to freedom of assembly and association.
- (4) The right of every person to security of his physical person and freedom of movement.
- (5) The right of every adult citizen to vote, to be a candidate for election to elective public office, and to fair opportunity for appointment to appointive public office on the basis of proper personal qualifications.
- (6) The right of every person to fair, effective and authoritative procedures, in accordance with principles of natural justice, for the determination of his rights and obligations under the law, and his liability to imprisonment or other penalty.
- (7) The right to have the ordinary courts presided over by an independent judiciary.

The statute should also include the rights and freedoms set out in the Canadian Bill of Rights but not included in the rights and freedoms we have enumerated. (p. 1609)

591. There should be no attempt to qualify in detail the general statement of rights and freedoms nor to catalogue exceptions. (p. 1610)
592. It should be made clear in general terms that the rights and freedoms are not absolute but are subject to proper limitations. (p. 1610)
593. It should be stated that the declaration lays down guidelines for legislators and presumptions for interpretation of legislation to be followed by courts and tribunals. (p. 1610)

594. No attempt should be made to incorporate the provisions of the Ontario Human Rights Code in the general declaration of rights and freedoms. It should be dealt with as a specific piece of legislation. (p. 1610)
595. The Ontario Bill of Rights should not deal with language rights. Those rights should be dealt with in specific legislation, not in general terms. (p. 1610)
596. A Bill of Rights properly drawn should be educative; it should bind the consciences of legislators, establish standards for public appraisal of legislation and alert a vigilant press. (p. 1610)

BIBLIOGRAPHY

TEXTS

- Archbold: *Criminal Pleading, Evidence and Practice* 923n
Austin: *Lectures on Jurisprudence* 1484
Austin, Granville: *The Indian Constitution: Cornerstone of a Nation* 1517n
Blackstone's Commentaries 40n
Bracton: *De Legibus et Consuetudinibus Angliae* 1488
Brett: *Cases in Constitutional and Administrative Law* 244n, 319n
Brown & Garner: *French Administrative Law* 1413, 1417n, 1425n, 1458n, 1463n, 1468n
Catholic Encyclopedia 820n
Challies: *The Law of Expropriation* 964n
Cohen: *A Preface to Logic* 1501n
Coode: *On Legislative Expression* 73n
Cooper: *State Administrative Law* 88n, 99n, 116n, 117, 118n, 154n, 155n, 158n, 163n, 164n, 165n 166n, 167n, 172n 173n, 223n, 287, 289, 290n, 292n, 293n, 296n, 299n, 327n, 336n, 337n, 1098n, 1120n, 1123n
Corry: *Democratic Government and Politics* 1545n, 1575n, 1576n
Crankshaw's *Criminal Code of Canada* 884n
Cross: *Evidence* 815n
Davis: *Administrative Law Treatise* 25n, 53n, 88n, 154n, 156n, 157n, 158n, 165n, 169n, 173n, 198, 206, 281n, 283-285, 290n, 292n, 296n, 319n, 322-324, 337, 417, 458n, 1105n
Dawson: *Procedure in The Canadian House of Commons* 1541n
Denning: *Freedom Under the Law* 413, 418
Dicey: *The Law of the Constitution* (10th ed.) 56, 1486
Dickinson: *Administrative Justice and the Supremacy of the Law* 25n
Dictionary of American History 3n
Driedger: *The Composition of Legislation* 73n
Edwards: *The Law Officers of the Crown* 933n, 944n
Freedeman: *The Conseil d'Etat in Modern France* 1425n
Friedland: *Detention Before Trial* 745n, 751
Friedmann: *Legal Theory* 1524n
Fuller: *The Law in Quest of Itself* 1489
Garner: *Administrative Law* 244n
Gellhorn: *Individual Freedom and Governmental Restraints* 1102n, 1163n, 1173
Ombudsmen and Others 6, 7n, 1341n, 1342n, 1343, 1345, 1346n, 1353n, 1385-1386

- Goodhart: *English Law and the Moral Law* 1476, 1488-1490
- Griffith and Street: *Principles of Administrative Law* 30n, 319n
- Halsbury: *Laws of England* (3rd ed.) 790n, 1046n, 1188n
- Hamson: *Executive Discretion and Judicial Control* 1411n, 1463n
- Hauriou: *Traité de Droit Administratif* 1452n
- Hewart: *The New Despotism* 106, 306
- Hohfeld: *Fundamental Legal Conceptions* 3n
- Holdsworth: *A History of English Law* 1554n
- Holmes: *Collected Legal Papers* 53n
- Jackson: *The Machinery of Justice in England* 748
- Jaffe: *Judicial Control of Administrative Action* 238n, 282n, 285-287, 291n, 294-297, 289n, 312-313
- Jennings: *The Law and The Constitution* 38, 1482, 1483, 1541, 1542n
- Kains: *How Say You?* 777n
- Keeton: *The United Kingdom* 1517n
- Kelsen: *General Theory of Law and State* 1482n, 1533
- Kennedy: *The Constitution of Canada* 867n
- Kenny: *Outlines of Criminal Law* 727n, 744
- Kersell: *Parliamentary Supervision of Delegated Legislation* 337
- Ketcham: *Legal Renaissance in the Juvenile Court* 581n
- Laferrière: *Traité de la Juridiction Administrative* 1452n
- Lang (ed.): *Contemporary Problems of Public Law in Canada* (1968) 1523n
- Laskin: *Canadian Constitutional Law* 1547n
- Lawson and Bentley: *Constitutional Administrative Law* 319n
- Lederman: "The Common Law System in Canada", *Canadian Jurisprudence: The Civil Law and Common Law in Canada*, a collection of essays edited by E. McWhinney 1532n
- "Legislative Power to Create Corporate Bodies and Public Monopolies in Canada" (1968), *Contemporary Problems of Public Law in Canada*, a collection of essays edited by O. E. Lang 1523n
- Lefroy: *Canadian Constitutional Law* 883n
- Lindsay: *The Modern Democratic State* 3n
- Maitland: *Constitutional History of England* 42
- The Shallows and Silences of Real Life* 53n, 515n
- Martin: *The Criminal Code of Canada* 884n
- McWhinney (ed.): *Canadian Jurisprudence: The Civil Law and Common Law in Canada* 1532n
- Mitchell: *Contracts of Public Authorities* 1472n
- Montesquieu: *L'Esprit des lois* 52n
- Mozley and Whiteley's *Law Dictionary* 244n
- Olivecrona: *Law as Fact* 1487
- Paton: *Jurisprudence* 23n
- Pollock: *A First Book of Jurisprudence* 1512n
- Pound: *Social Control Through Laws* 1477
- Purchase and Wollaston: *Jervis on Coroners* 482n

- Puttkammer: *Administration of the Criminal Law* 726n
- Robertson (ed.): *Human Rights in National and International Law* 1511n
- Rowat: *The Ombudsman* 1340
- Rule of Law*, Inns of Court Conservative and Unionist Society (1955) 1410
- Samuels: *New York Family Court Law and Practice* 601
- Sheridan: *The Federation of Malaya Constitution* 1510
- Smith, de: *Judicial Review of Administrative Action* 30n, 65n, 76n, 87n, 136n, 156n, 188n, 244n, 319n
- The New Commonwealth and Its Constitutions* 1517
- Stone: *Legal System and Lawyers' Reasonings* 1507
- Tarnopolsky: *The Canadian Bill of Rights* 1527-1528, 1599
- Tremear's Annotated Criminal Code* 884n
- Varcoe: *The Constitution of Canada* 883n
- Wade, H. W. R.: *Administrative Law* 65n, 129n, 139n, 187, 195n, 199n, 244n, 277n, 319n, 320, 337, 992n, 1003n, 1005n
- Towards Administrative Justice* 76n, 157n, 198n, 199n, 217, 243n
- Waline: *Droit Administratif*, 1959, No. 724 1449n
- Wigmore On Evidence* 437n, 818n, 822n
- Wolff: *Private International Law* 1526
- Yardley: *Introduction to British Constitutional Law* 319n
- A Source Book of English Administrative Law* 244n, 319n, 337n

JOURNALS

- Barrett and Brown and Cramer: *Juvenile Delinquents: the Police, State Courts, and Individualized Justice*, 79 Harv. L. Rev. 775, 575n
- Beck: *Electronic Surveillance and The Administration of Criminal Justice*, 46 C.B.R. 643 (1968) 1580n, 1583-1585
- Bellot: *The Origin of the Attorney-General*, 25 L.Q. Rev. 400 818n
- Borchard: *State Indemnity for Errors of Criminal Justice*, 21 Boston U.L. Rev. 201 (1942) 835n
- Bowker: *Basic Rights and Freedoms: What Are They?* 37 C.B.R. 43, (1959) 1527
- Bratholm: *Compensation of Persons Wrongfully Accused or Convicted in Norway*, 190 U. Pa. L. Rev. 833 (1961) 836n, 842n
- Davies and Maudsley: *The Justice of the Peace in England*, 18 U. Miami L. Rev. 517 (1964) 514n
- Edwards, LL. J.: *Compensation to Victims of Crimes of Personal Violence*, a paper prepared by the Director of the Centre of Criminology at the University of Toronto (March, 1966) 847n
- Elliff: *Notes on the Abolition of the Grand Jury in England*, 29 J. Crim. Law 3 774n

- Ferguson: *The Grand Jury*, 5 Cr. Law Q. 210 (1962-63) 778n
- Friendly: *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863 (1962) 1100n
- Garner: *Compulsory Purchase Procedure*, 1 New Law Jour. 8 (1965) 962n
- Gordon: *Administrative Tribunals and the Courts*, 49 L.Q. Rev. 94 (1933) 247n
Certiorari and the Revival of Error in Fact, 42 L.Q. Rev. 521 (1926) 247n
The Observance of Law as a Condition of Jurisdiction, 47 L.Q. Rev. 386 (1931) 247n
The Relation of Facts to Jurisdiction, 45 L.Q. Rev. 459 (1929) 247n
- Handler: *The Juvenile Court and the Adversary System: Problems of Function and Form*, (1965) Wis. L. Rev. 7 587
- Hill: *Protecting Human Rights in Ontario, 1793-1968*, 8 Human Relations 8-9 (No. 16, March 1968) 1556
- Hill and Pollock: *Human Rights Legislation in Ontario*, "Race" IX, The Journal of the Institute of Race Relations, London 199 (No. 2, 1967) 1560n
- Jones: *The Rule of Law and The Welfare State*, 58 Col. L. Rev. 143, (1958) 1562-1563
- Lederman: *The Nature and Problems of a Bill of Rights*, 37 C.B.R. 4 (1959) 1480n, 1487n
- Mack: *The Juvenile Court*, 23 Harv. L. Rev. 104 (1909) 575n
- McCune and Skaler: *Juvenile Court Judges in the United States*, 11 Crime and Delinquency 121 (1965) 589n
- Mitchell: *Administrative Law and Parliamentary Control*, 38 Political Quarterly 360 1412, 1413
- Paulsen: *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547 (1957) 579n.
Juvenile Courts, Family Courts and the Poor Man, 54 Calif. L. Rev. 696 (1966) 590n
Kent v. United States: The Constitutional Context of Juvenile Cases, [1966] Sup. Ct. Rev. 167, 583n
- Payment of Jurymen* (1948) 206 L.T. 179 855n
- Pound: *Juristic Science and Law*, 31 Harv. L. Rev. 1047 (1918) 1477, 1512
- Rivero: *Le juge administratif un juge qui gouverne?* Dalloz 1951, Chronique No. 21 1441
- Wade, H. W. R.: *Crossroads in Administrative Law*, 21 Current Legal Problems 75 (1968) 1414
Unlawful Administrative Action: Void or Voidable? Part I, 83 L.Q. Rev. 499 (1967) 331n

- Wolf: *On the Nature of Legal Persons*, 54 L.Q. Rev. 494 (1938) 1521-1522
Wootton: *The Juvenile Courts*, [1961] Crim. L. Rev. 669 572n

REPORTS

- Amendment of The Constitution of Canada, The (White Paper) 1543n
Advisory Committee on Taxicabs to the Board of Commissioners of
Police of the City of Toronto (Ontario, 1932) 1113n
Auditor-General of Canada (1962) 714
Boyd Committee on the Mode of Appointing and Remunerating Cer-
tain Provincial Officers, Now Paid by Fees (Ontario, 1895) 867n,
869n, 870n, 874n
On the Bren Machine Gun Contract (1939) 464n
Canadian Charter of Human Rights, A (White Paper) 1553n, 1578n
Compensation for Victims of Crimes of Violence, a Report by Justice
(1962) 847n
Compensation for Victims of Crimes of Violence, Home Office (1964)
846n
Constitution and the People of Canada, The (1969) (White Paper)
1588n
Council on Tribunals (1965) 202n
(1963) 204n
(1959) 205n
(1963) 205n
Departmental Committee on Proceedings Before Examining Justices
(1958) Cmd. 479 757n, 759n
Donoughmore Committee on Ministers' Powers (1932) 106, 107n,
108n, 109n, 110n, 184n, 185n, 186n, 278, 319n, 345n, 371n, 1130n
Dunton-Laurendeau Commission on Bilingualism and Biculturalism
1547-1548
Federal Attorney General's Committee on the Need for Procedural
Reform in the Field of Administrative Law (1941) 149, 160n
Federalism for the Future (1968) (White Paper) 1588n
Franks Committee on Administrative Tribunals and Inquiries 112n,
114n, 189n, 191n, 192n, 193n, 195n, 196n, 197n, 198n, 200n, 201n,
233n, 279, 320n, 1004n, 1005n, 1197n, 1410, 1411
Glassco Commission on Government Organization (1962) 949n
Gordon Committee on the Organization of Government in Ontario
(1959) 319n, 980n, 992n
Gregory Committee on the Best Mode of Selecting, Appointing and
Remunerating Sheriffs (Ontario 1921-1922) 867n
Inspector of Legal Offices for the Province of Ontario
(1956) 611n
(1965) 898n
(1966) 611n, 630n

- On the International Congress of Jurists, New Delhi (1959) 59n
- On Judicial Administration, Maryland Bar Association (1965) 663n
- On the Jurisdiction of County and District Courts (Ontario, 1961) 715n
- On Juvenile Delinquency in Canada (1965) 555n, 563n
- Katzenbach Report on the Challenge of Crime in a Free Society (1967) 599, 600n
- Kilbrandon Committee on Children and Young Persons, Scotland (1964), Cmd. 2306 573n
- Law Reform Committee (1967), Cmd. 3472 832n
- On Ministers' Powers, Cmd. 4060 999n
- Ontario Law Reform Commission on the Basis for Compensation on Expropriation (1967) 961n, 1029n, 1044n, 1052n, 1061n
- Orr Report on Administrative Justice in New Zealand 65n, 244n, 319n, 327n
- Penal Practice in a Changing Society, Home Office (1959) 846n
- Salmon Committee on Tribunals of Inquiry (1966), Cmd. 3121 446n, 450n, 453n
- Select Committee of the Legislature on Land Expropriation (Ontario, 1962) 705n, 1014n, 1027n
- Select Committee of the Legislature on the Municipal Act (Ontario, 1963) 566n, 705n
- Select Committee of the Legislature on Youth (Ontario, 1967) 565n

TABLE OF CASES

<i>Adkins v. Children's Hospital</i> (1923), 261 U.S. 525	1523
<i>Adler</i> , October 18, 1950, Conseil d'Etat, 761	1431n
<i>d'Allière</i> , 7 février 1947, Conseil d'Etat	1422
<i>Alberta Statutes, Re</i> , [1938] S.C.R. 100	761n, 1495, 1497n, 1601
<i>Albertson v. Subversive Activities Control Board</i> , 382 U.S. 70 (1965)	1622
<i>L'Alliance des Professeurs Catholiques de Montreal v.</i> <i>Labour Relations Board</i> , [1953] 2 S.C.R. 140	137n, 141n
<i>Allinson and the Court of Referees, Re</i> , [1945] O.R. 477 ..	137n, 145n
<i>Ambard v. Attorney-General for Trinidad and Tobago</i> , [1936] A.C. 322	50n
<i>Anderson v. Gorrie</i> , [1895] 1 Q.B. 668	47n
<i>Archibald v. R.</i> (1891), 2 Ex. C.R. 374	1472n
<i>Arnaud</i> , 11 August 1918, Conseil d'Etat, 837	1443n
<i>Arndstein v. McCarthy</i> , 254 U.S. 71	1615n
<i>Arrêt Trépont</i> , January 20, 1922, <i>Revue de Droit Public</i> 1922, 82	1447
<i>Associated Provincial Picture Houses Limited v.</i> <i>Wednesbury Corporation</i> , [1948] 1 K.B. 223	261n
<i>Association des Bibliothécaires Français</i> , June 20, 1930, Daloz 1932 2e Partie 25	1434n
<i>Attorney-General v. Clough</i> , [1963] 1 Q.B. 773	827n
<i>Attorney-General v. DeKeyser's Royal Hotel</i> , [1920] A.C. 508 ..	962n
<i>Attorney-General v. Hitchcock</i> (1847), 1 Exch. 91	814n
<i>Attorney-General v. Mulholland</i> , [1963] 2 Q.B. 477	826n, 827n
<i>Attorney-General v. Wilts Dairies Ltd.</i> (1921), 38 T.L.R. 781 ..	351n
<i>Attorney-General for Ontario and Display Service Co. Ltd. v.</i> <i>Victoria Medical Bldg. Ltd.</i> , [1960] S.C.R. 32	1465n
<i>Attorney General Saskatchewan v. Pritchard</i> (1961), 130 C.C.C. 61	728n
<i>Baillon de la Brosse</i> , 9 November 1960, <i>Revue du Droit Public</i> 1961, 343	1425n
<i>Bank of Commerce v. Minister of National Revenue</i> , [1962] S.C.R. 729	76n
<i>Bank of Toronto v. Lambe</i> , [1887] A.C. 575	1613
<i>Barel</i> , 29 May 1954, Conseil d'Etat	1438n, 1461n
<i>Bathville Corporation Ltd. et al v. Atkinson et al</i> , [1964] 2 O.R. 17 affirmed [1965] 1 O.R. 340	412n
Vol. 1, pp. 1-498: Vol. 2, pp. 499-956: Vol. 3, pp. 957-1332: Vol. 4, pp. 1333-1733	

<i>Beaugé</i> , 4 July 1929, Conseil d'Etat, 641	1440
<i>Belkacem Bentami</i> , 18 June 1926, Conseil d'Etat, 614	1431n
<i>Benedictins de Poitiers</i> , 23 January 1906, Conseil d'Etat, 178 ...	1447n
<i>Benjamin</i> , 19 May 1933, Sirey 1939, IIIème Partie, 1	1450
<i>Berthier</i> , 28 July 1952, Conseil d'Etat, 431	1449n
<i>Biggs v. M.N.R.</i> , [1954] Ex. C.R. 702	412n
<i>Bird v. Jones</i> (1845), 7 Q.B. 742	726n
<i>Bishop v. Ontario Securities Commission</i> , [1964] 1 O.R. 17..	142n, 143
<i>Bizet</i> , 23 March 1867, Conseil d'Etat, 271	1428n
<i>Board of Education v. Rice</i> , [1911] A.C. 179	139n, 140, 143, 182n
<i>Board of Education for the Township of North York v.</i> <i>Village Developments Ltd.</i> , [1956] S.C.R. 539	1042n
<i>Board of Health for the Township of Saltfleet v. Knapman</i> , [1956] S.C.R. 877	137n, 140n, 253n
<i>Bonanza Creek Gold Mining Co. Ltd. v. The King</i> , [1916] 1 A.C. 566	963n
<i>Boney</i> , June 16, 1944, Conseil d'Etat, 171	1437n
<i>Border Cities Press Club v. Attorney General for Ontario</i> , [1955] O.R. 14	42n, 318n
<i>Bossis</i> , 15 February 1956, <i>Revue Pratique de Droit</i> <i>Administratif</i> , 54	1443n
<i>Boulard</i> , 18 July 1947, Conseil d'Etat, 327	1446n
<i>Boyd v. United States</i> , 116 U.S. 616 (1886)	1613, 1614
<i>Brampton Jersey Enterprises Ltd. v. Milk Control Board</i> <i>of Ontario</i> , [1956] O.R. 1	1099n, 1100n, 1104n, 1348n, 1469n
<i>Broad v. Pitt</i> (1828), 3 Car. & P. 518	824n, 826n
<i>Brookhaven v. Smith</i> (1907), 188 N.Y. 74	1648
<i>Brooks v. Pavlick</i> , [1964] S.C.R. 108	34n
<i>Brown and Brock and Rentals Administrator, Re</i> , [1945] O.R. 554	253n
<i>Brown and the Corporation of Peterborough, Re</i> , [1957] O.R. 224	983n
<i>Buillon</i> , 31.1.1951, Conseil d'Etat	1434n
<i>Cadot</i> , 1889, Conseil d'Etat	1421
<i>Calgary Power Ltd. v. Copithorne</i> , [1959] S.C.R. 24 ..	141n, 147n, 991n
<i>Camara v. Municipal Court of the City and County of</i> <i>San Francisco</i> , 87 Sup. Ct. 1727 (1967)	415n
<i>Canadian Bank of Commerce v. Attorney General of Canada</i> , [1962] O.R. 253; [1962] S.C.R. 729	65n, 394n, 398n
<i>Canadian Memorial Chiropractic College v. Municipality</i> <i>of Metro Toronto</i> , [1967] 1 O.R. 244	1038n
<i>Chabert</i> , May 20, 1955, Conseil d'Etat, 270	1446n
<i>Chemical Regulations, Reference re</i> , [1943] S.C.R. 1	260n, 343n, 345n, 350n

<i>Children's Aid Society of the County of York, Re,</i> [1934] O.W.N. 418	454n
<i>Chong Wa</i> , January 23, 1953, Conseil d'Etat, 34	1431n
<i>Cities Service Oil Co. Ltd. v. City of Kingston, Re,</i> [1956] O.W.N. 804	1104n, 1348n, 1470n
<i>Commune de Morbier</i> , 7 Thermidor An. X	1427n
<i>Condamine</i> , June 7, 1957, Revue de Droit Public 1958, 98	1437n
<i>Coney Island Dairy Products Corporation v. Baldwin,</i> 243 App. Div. 178; 276 N.Y.S. 682 (3d) Dept. (1935)	166n
<i>Consolidated Edison Company v. N.L.R.B.</i> , 305 U.S. 197 (1938)	291n
<i>Consorts Legrand</i> , 28 May 1935, Conseil d'Etat, 609	1425n
<i>Cooper v. Wandsworth Board of Works</i> (1863), 14 C.B. (n.s.) 180	182n
<i>Cooperative Committee on Japanese Canadians v.</i> <i>Attorney General of Canada</i> , [1947] A.C. 87	264n
<i>Couder et Bouchers de Paris</i> , February 20, 1868, Conseil d'Etat, 193	1428n
<i>Coutéas</i> , November 30, 1923, Conseil d'Etat, 789	1445n
<i>Counselman v. Hitchcock</i> , 142 U.S. 547 (1892)	1614
<i>Crowell v. Benson</i> , 285 U.S. 22 (1932)	296n
<i>Crown Grain Co. Ltd. v. Day</i> , [1908] A.C. 504	35n
 <i>Dame de la Murette</i> , March 27, 1952 (Tribunal des Conflits) in les Grands Arrêts de la Jurisprudence, 358	
<i>Dame Kirkwood</i> , May 30, 1952, Revue de Droit Public, 701	1437n
<i>Dame Veuve Perrot</i> , May 16, 1928, Conseil d'Etat, 187	1451n
<i>Darmon et autres</i> , 21 January 1944, Conseil d'Etat, 22	1444n
<i>De Laboulaye</i> , 29 October 1960, Conseil d'Etat, 570	1444n
<i>Dembie v. Dembie</i> 1963 unreported	822n
<i>Demoiselle Pierre</i> , March 4, 1949, Conseil d'Etat, 112	1453
<i>Département de la Mayenne</i> , June 30, 1905, Conseil d'Etat, 576	1453n
<i>Descours</i> , 10 January 1951, Conseil d'Etat, 12	1451n
<i>Diamond and the Ontario Municipal Board</i> , [1962] O.R. 328 ...	437n
<i>Distillerie de Magnac Laval</i> , 2 May 1958, Conseil d'Etat, 246 ...	1431n
<i>Donoghue v. Stevenson</i> , [1932] A.C. 562	1503, 1504, 1505
<i>Drew v. Nunn</i> (1879), 4 Q.B.D. 661	1251n
<i>Duboucher</i> , 18 February 1955, Conseil d'Etat, 446	1458n
<i>Duchess of Kingston's Case</i> (1776), S.C. 1 East P.C. 468; 168 E.R. 175	817n
<i>Ducommun</i> , 20 July 1951, Conseil d'Etat, 422	1443n
<i>Duncan v. Cammell, Laird and Co. Ltd.</i> , [1942] A.C. 624	815n
<i>Dupuy-Briace</i> , March 28, 1807, R.L. 75	1427n
<i>Duthoit and Province of Manitoba, Re</i> (1966), 54 D.L.R. (2d) 259	1058n
<i>Dyke and McEachern and the Village of Port Credit, Re,</i> [1950] O.W.N. 651	1104n

<i>Eastern Trust Company v. Mackenzie Mann and Co. Ltd.</i> , [1915] A.C. 750	40n
<i>Egret Thomassin</i> , November 18, 1818, Conseil d'Etat, II, 424 ...	1427n
<i>Election au Conseil locale de l'établissement de Pondichery</i> , 16 November 1938, Conseil d'Etat, 848	1435n
<i>Empsak v. United States</i> , 349 U.S. 190 (1955)	1615n, 1619
<i>Errington v. Minister of Health</i> , [1935] 1 K.B. 249	187n
<i>Escobedo v. Illinois</i> , 378 U.S. 478 (1954)	1616
<i>Eshugbayi Eleko v. Government of Nigeria</i> , [1928] A.C. 459	76n
<i>Esquimalt and Nanaimo R. Co. v. Wilson</i> , [1920] A.C. 358	318n
<i>Etablissement public Barret</i> , 13 December 1957, Conseil d'Etat, 675	1431n
 <i>Fairfield Modern Dairy Limited and the Milk Control</i> <i>Board of Ontario, Re</i> , [1942] O.W.N. 579	
<i>Fauvreau</i> , November 12, 1930, Conseil d'Etat, 928	1461n
<i>Fédération des Travailleurs du Sous-Sol</i> , 4 February 1949, Conseil d'Etat, 57	1449n
<i>Feeley and McDermott, Ex parte, Re Ontario Crime</i> <i>Commission</i> [1962] O.R. 872	448n, 454n, 456n
<i>Fernandez, Ex parte</i> (1861) 10 C.B. (n.s.) 3	438n
<i>Florence Mining Co. v. Cobalt Lake Mining Co.</i> (1908), 18 O.L.R. 275	963n
<i>Franklin v. Minister of Town and Country Planning</i> , [1948] A.C. 87	187n
<i>Fray v. Blackburn</i> (1863), 3 B. & S. 576	47n
<i>Frome United Breweries Co. v. Keepers of the Peace and</i> <i>Justices for County Borough of Bath</i> , [1926] A.C. 586	48n
 <i>Garrigue</i> , 16 May 1956, Dalloz 1956, 252	1431n
<i>Gault, In re, v. U.S.</i> , 87 Sup. Ct. 1428 (1967) 590n, 592n, 593n, 594n, 595n, 596n, 598n, 599n	
<i>Gayral</i> , July 25, 1934, Conseil d'Etat, 901	1451n
<i>Georgin</i> , 27 April 1928, Conseil d'Etat, 536	1440n
<i>Géraud</i> , 19 January, 1910, Conseil d'Etat, 23	1439n
<i>Gervaise</i> , July 10, 1957, Dalloz 1957, Sommaire, 15	1457n
<i>Gideon v. Wainwright</i> , (1963) 372 U.S. 335	1640
<i>Glassman and the Council of the College of Physicians and</i> <i>Surgeons, Re</i> , [1966] 2 O.R. 81	1185n, 1186n, 1187n, 1200n
<i>Goldhar v. The Queen</i> , [1960] S.C.R. 60	509n
<i>Gompers v. United States</i> , 233 U.S. 604 (1913)	1615n
<i>Gransee</i> , 3 January 1936, Conseil d'Etat, 6	1449n
<i>Gras</i> , January 11, 1935, Dalloz Hebdomadaire, 1935, 186	1431n
<i>Grayson v. The Queen</i> , [1956-60] Ex. C.R. 331	1011n
<i>Greenberg v. United States</i> , 341 U.S. 944 (1951)	1619
<i>Greenberg v. United States</i> , 343 U.S. 918 (1952)	1618, 1619
 Vol. 1, pp. 1-498: Vol. 2, pp. 499-956: Vol. 3, pp. 957-1332: Vol. 4, pp. 1333-1733	

<i>Greenhough v. Gaskell</i> (1833), 1 My. & K. 98; 39 E.R. 618	819n
<i>Groban, In re</i> , 352 U.S. 330	165n
<i>Grosso v. United States</i> , 88 S. Ct. 709 (1968)	1622, 1625n
<i>Guarde Nationale de Paris</i> , décembre 28, 1832, Conseil d'Etat	1421
<i>Guay v. Lafleur</i> , [1965] S.C.R. 12	447n
<i>Guicysse</i> , 4 February 1944, Conseil d'Etat, 45	1444n
<i>Guillot</i> , 4 January 1960, Conseil d'Etat, 4	1459n
<i>Guillou</i> , 31 January 1951, Conseil d'Etat, 53	1443n
<i>Habitant de Montagnard</i> , 14-7-1811, Conseil d'Etat	1427n
<i>Haley v. Ohio</i> , 332 U.S. 596 (1948)	597n
<i>Hall, Ex parte, Re Ont. Lab. Rel. Board</i> , [1963] 2 O.R. 239	253n
<i>Hamer v. Etobicoke Board of Education</i> , [1967] 1 O.R. 268 affirmed [1967] 1 O.R. 595 sub. nom <i>Meeson v. Etobicoke Board of Education</i>	991n
<i>Harding v. Township of Cardiff</i> (1881), 29 Gr. 308	964n
<i>Harris (W.) & Co. Ltd. v. Municipality of Metro Toronto</i> , [1965] 2 O.R. 135	1037n, 1038n
<i>Haynes v. United States</i> , 390 U.S. 85; 88 S. Ct. 722	1587, 1623, 1624, 1625
<i>Henley v. Henley</i> , [1955] 1 All E.R. 590	825n
<i>Henry's Drive-In and the Hamilton Police Board, In re</i> , [1960] O.W.N. 468	255n
<i>Heyriès</i> , June 28, 1918, in les Grands Arrêts de la Jurisprudence Administrative, 128	1435
<i>Hodge v. The Queen</i> (1883), 9 A.C. 117	503n
<i>Hoffmann v. United States</i> , 341 U.S. 479 (1951)	1619
<i>Hollenberg v. B.C. Optometric Association</i> (1967), 61 D.L.R. (2d) 295	250n
<i>Hurlaux</i> , 16 February 1940, Conseil d'Etat, 65	1458n
<i>Hydro-Electric Power Commission for Ontario v.</i> <i>County of Grey</i> (1924), 55 O.L.R. 339	964n
<i>Hynes v. Swartz</i> , [1938] O.R. 77	1200n
<i>Hynes and Swartz, Re</i> , [1937] O.R. 924	657n
<i>I.C.C. v. Brimson</i> , 154 U.S. 447 (1894)	442n
<i>Income Tax Special Purpose Commissioners, Re</i> (1888), 21 Q.B.D. 313	76n
<i>Initiative and Referendum Act</i> , [1919] A.C. 935	1605
<i>Ives v. South Buffalo R. Co.</i> , 1911, 201 N.Y. 271, 94 N.E. 431, Ann. Cas. 1912 XB 156	1649
<i>Jackson v. Gridley</i> , 18 Johns. 98	1636
<i>James v. Commonwealth</i> , [1936] A.C. 578	1495
<i>James v. Hydro-Electric Power Commission of Ontario</i> , [1953] O.R. 349 affirmed [1953] O.R. 728	965n, 985n
Vol. 1, pp. 1-498: Vol. 2, pp. 499-956: Vol. 3, pp. 957-1332: Vol. 4, pp. 1333-1733	

<i>John East Iron Works v. Lab. Rel. Bd. of Saskatchewan</i> , [1949] 3 D.L.R. 51, [1949] A.C. 134	34n, 257n, 1465n
<i>Johnson v. U.S.</i> , 333 U.S. 46 (1947)	1055n
<i>Jouanne</i> , November 26, 1924, Conseil d'Etat, 931	1453
<i>Kelly v. Sullivan</i> (1876), 1 S.C.R. 1	666n
<i>Kent v. United States</i> , 383 U.S. 541 (1966)	583n
<i>Kerr v. Town of Petrolia</i> (1921-22), 51 O.L.R. 74	1251n
<i>King, The v. Bradford</i> , [1908] 1 K.B. 365	81n, 297n
<i>King, The v. Justices of Sunderland</i> , [1901] 2 K.B. 357	48n
<i>King, The v. Kendall</i> (1912), 14 Ex. C.R. 71	1058n
<i>King, The v. W. D. Morris Realty Ltd.</i> , [1943] Ex. C.R. 140	1058n
<i>Kipp v. Attorney General of Ontario</i> , [1965] S.C.R. 57	266n
<i>Kobler</i> , 31 October 1950, Conseil d'Etat, 523	1448n
<i>Labour Relations Board of Saskatchewan v. The Queen</i> , [1956] S.C.R. 82	265n
<i>Labour Relations Board of Saskatchewan v. Speers</i> , [1947] 2 W.W.R. 927	257n
<i>LaRush v. Metropolitan Toronto and Region Conservation Authority</i> , [1968] O.R. 300	1348n, 1469
<i>Latour</i> , 9 July 1948, Dalloz, 1949, Sommaire, 50	1441
<i>Leigh v. Cole</i> (1853), 6 Cox C.C. 329	425n
<i>Letain v. Conwest Exploration Co.</i> , [1961] S.C.R. 98	274n
<i>Lewis v. United States</i> , 348 U.S. 419 (1955)	1622
<i>Lherbier</i> , 20 November 1953, Conseil d'Etat, 510	1425n
<i>L'homme</i> , 12 May 1950, Conseil d'Etat, 284	1459n
<i>Local Government Board v. Arlidge</i> , [1915] A.C. 120	183n, 198
<i>Lochner v. New York</i> , (1905) 198 U.S. 45	1523
<i>Londoner v. Denver</i> , 210 U.S. 373	153n
<i>Low & Minister of National Revenue, Re</i> , [1967] 1 O.R. 135	317n
<i>Magor v. Newport</i> , [1952] A.C. 189	1613
<i>Maher v. Sheridan</i> , [1966] 2 O.R. 284	1066n
<i>Maillou</i> , 22 May 1946, Conseil d'Etat, Tables, 470	1442n
<i>Marc et Chambre Syndicale de Propriétés Immobilières de la Ville de Paris</i> , 3 June 1908, Sirey 1909, III Partie, 113	1449n
<i>Marchetti v. United States</i> , 88 S. Ct. 697 (1968)	1622, 1623
<i>Marechal</i> , August 8, 1805, Conseil d'Etat, 758	1428n
<i>Marshall v. The Queen</i> , [1961] S.C.R. 123	830n, 831n
<i>Martin</i> , 9 June 1961, Conseil d'Etat	1443n
<i>Mason v. United States</i> , 244 U.S. 362	1617
<i>Massey Mfg. Co., Re</i> (1866), 13 O.A.R. 446	30n
<i>Masson</i> , 28 February 1948, Conseil d'Etat, 38	1448n
Vol. 1, pp. 1-498: Vol. 2, pp. 499-956: Vol. 3, pp. 957-1332: Vol. 4, pp. 1333-1733	

<i>Maurisset</i> , 1956, Conseil d'Etat, 412	1425n
<i>Mazet et Boulangers de Montluçon</i> , February 4, 1869, Sirey 1870 III Partie, 92	1428n
<i>McCarthy v. Arndstein</i> , 266 U.S. 34	1615, 1621
<i>McCormick et al & the Twp. of Toronto</i> , [1948] O.W.N. 425 ...	1104n
<i>McEwen, Re; Board of Review for Manitoba et al v.</i> <i>The Trust and Loan Co. of Canada</i> , [1941] S.C.R. 542	76n, 251n, 252n
<i>McGillivray & Hamilton, Re</i> , [1947] O.W.N. 761 aff. [1947] O.W.N. 905	1103n
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961)	1578
<i>McGuinness v. Attorney General of Victoria</i> (1940), 63 C.L.R. 73	817n
<i>Meador, In re</i> , Fed. Cas. No. 9375 (1869)	1613n
<i>Meeson v. Etobicoke Board of Education</i> , [1967] 1 O.R. 268 aff. [1967] 1 O.R. 595	991n
<i>Mehr v. Law Society of Upper Canada</i> , [1955] S.C.R. 344 ...	137n, 1185n
<i>Melot</i> , 4 January 1954, Recueil des Tables du Conseil d'Etat, 866	1425n
<i>Mesmer</i> , 23 May 1947, Conseil d'Etat, 218	1430n
<i>Metropolitan Toronto v. The Village of Forest Hill</i> , [1957] S.C.R. 569	342n
<i>Minister of Railways v. Simmer etc. Mines Ltd.</i> , [1918] A.C. 591	965n
<i>Ministre des Anciens Combattants, c. Delaporte</i> , 4 December 1959, Conseil d'Etat, 655	1448n
<i>Miranda v. Arizona</i> , 86 Sup. Ct. 1602 (1966)	586n
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	1616
<i>Mogambury</i> , 2 December 1892, Dalloz, 1893, IIIe Partie, 1 ...	1450n
<i>Mole v. Mole</i> , [1950] 2 All E.R. 328	825n
<i>Moses & Institute of Chartered Accountants, Re</i> , [1965] 1 O.R. 155	1098n
<i>Mouvement Social Français des Croix de Feu</i> , 27 November 1936, Recueil Arrêts, Conseil d'Etat, 1039 ...	1455n
<i>Municipal District of Sugar City v. Bennett & White Limited</i> & <i>Attorney General of Canada</i> , [1950] S.C.R. 450	252n, 294n
<i>Nakkuda Ali v. Jayaratne</i> , [1951] A.C. 66	186n
<i>N.L.R.B. v. Columbian Enameling & Stamping Co.</i> , 306 U.S. 292 (1939)	173n, 291n
<i>Normanshaw v. Normanshaw</i> (1893), 69 L.T. 468	820n
<i>Norris v. Alabama</i> , 294 U.S. 587 (1935)	1639
<i>Oeuvres de St Nicolas</i> , 7 June 1950, Conseil d'Etat, 422	1440n
<i>O'Grady v. Sparling</i> , [1960] S.C.R. 804	503n, 504n
Vol. 1, pp. 1-498: Vol. 2, pp. 499-956: Vol. 3, pp. 957-1332: Vol. 4, pp. 1333-1733	

<i>Oklahoma Press Publishing Company v. Walling</i> , 327 U.S. 186 (1946)	431n
<i>Ontario Labour Relations Board & Bradley, Re</i> , [1957] O.R. 316	250n, 271n
<i>Padfield v. Minister of Agriculture</i> , [1968] A.C. 997	1348n, 1470
<i>Pasquale & Twp. of Vaughan, Re</i> , [1967] 1 O.R. 417	1022n
<i>Patton v. The Yukon Consolidated Gold Corporation Ltd.</i> , [1933] O.R. 192	797n, 798n
<i>Paul v. The Queen</i> , [1960] S.C.R. 359	508n
<i>Paya Monzo</i> , 29 March 1957, Conseil d'Etat	1460n
<i>People v. Priest</i> , (1912), 206 N.Y. 274	1642
<i>Petalas</i> , November 1955, Conseil d'Etat, 548	1435
<i>Pieton Guibout</i> , July 13, 1956, Conseil d'Etat, 440	1456n
<i>Polly v. Saratoga etc. R.R. Co.</i> , (1852) 9 Barbour 449	1642
<i>Poussier</i> , 20 April 1949, Conseil d'Etat, 189	1446n
<i>Powell v. Alabama</i> , 287 U.S. 45	164n
<i>Préfet de Police</i> , 9 May 1952, Conseil d'Etat, 236	1437n
<i>Préfet du Var</i> , 15 June 1954, Conseil d'Etat, 398	1455
<i>Proprietary Articles Trade Association v.</i> <i>Attorney General of Canada</i> , [1931] A.C. 310	504n
<i>Proud Homes Limited & Hamilton Board of Education, Re</i> , [1966] 2 O.R. 378	1037n
<i>Provincial Secretary of P.E.I. v. Egan</i> , [1941] S.C.R. 396	504n
<i>Public Inquiries Act & Shulman, Re</i> , [1967] 2 O.R. 375	448n, 454n, 455n
<i>Quinn v. United States</i> , 349 U.S. 155	1615n, 1619, 1620
<i>Quong Wing v. The King</i> (1914), 49 S.C.R. 440	503n
<i>R. v. Adams</i> , [1946] O.R. 506	617n, 923n
<i>R. v. Alepin Frères Ltée.</i> , [1965] S.C.R. 359	508n
<i>R. v. Ashford (Kent) Justices; Ex parte Richley</i> , [1955] 3 All E.R. 604	257n
<i>R. v. Botting</i> , [1966] 2 O.R. 121	771n
<i>R. v. Boyes</i> , 1 Best and Sm. 311, 121 E.R. 730	1617, 1619
<i>R. v. Bradford</i> , [1908] 1 K.B. 365	81n, 297n
<i>R. v. Casey</i> , [1963] 3 C.C.C. 85	785n
<i>R. v. Commissioners for Special Purposes of Income Tax</i> (1888), 21 Q.B.D. 313	250n
<i>R. v. Cowden</i> , [1947] O.W.N. 1018	770n
<i>R. v. Cox & Railton</i> (1884), 1 Q.B.D. 153	818n
<i>R. v. Davies</i> , [1906] 1 K.B. 32	445n
<i>R. v. Dodd</i> , [1957] O.R. 5	249n
<i>R. v. The Doliver Mountain Mining & Milling Co.</i> (1906), 10 C.C.C. 405	785n

<i>R. v. The Dominion Steel & Coal Corporation</i> (1957), 116 C.C.C. 117	869n
<i>R. v. Dowling</i> (1889), 17 O.R. 698	254n
<i>R. v. Electricity Commissioners</i> , [1924] 1 K.B. 171	182n
<i>R. v. Giles</i> , [1930] 3 D.L.R. 273; 53 C.C.C. 248	785n
<i>R. v. Glanzer et al</i> , [1963] 2 O.R. 30	445n
<i>R. v. Hepworth & Fearnley</i> , [1955] 2 Q.B. 600	1200n
<i>R. v. Hills</i> (1926), 44 C.C.C. 329	728n
<i>R. v. Hurlen</i> (1959), 123 C.C.C. 54	728n
<i>R. v. Isbell, Re</i> , (1928), 50 C.C.C. 81	515n
<i>R. v. Johnston</i> (1876), 38 U.C.Q.B. 549	1097n
<i>R. v. Justices of the County of London</i> , [1893] 2 Q.B. 476	226n
<i>R. v. Justices of Sunderland</i> , [1901] 2 K.B. 357	48n
<i>R. v. Kaylor</i> , [1939] 3 W.W.R. 307	770n
<i>R. v. Keepers of the Peace & Justices of the County of London</i> (1890), 25 Q.B.D. 357	790n
<i>R. v. Keepers of the Peace & Justices of the County of London</i> , [1945] 2 All E.R. 298	790n
<i>R. v. Kendall</i> (1912), 14 Ex. C.R. 71	1058n
<i>R. v. Krueger</i> [1949] 1 W.W.R. 140; 93 C.C.C. 245	770n
<i>R. v. Lee</i> (1917), 16 Ex. C.R. 424	256n
<i>R. v. Legislative Committee of the Church Assembly</i> (1928), 1 K.B. 411	141n
<i>R. v. Leong Ba Chai</i> , [1954] S.C.R. 10	265n, 266n
<i>R. v. Malloy</i> (1900), 4 C.C.C. 116	515n
<i>R. v. Metro Police Commissioner; Ex parte Parker</i> , [1953] 1 W.L.R. 1150	186n
<i>R. v. Nat Bell Liquors Ltd.</i> , [1922] 2 A.C. 128	74n, 262n, 263n, 274n, 311n, 1605
<i>R. v. Northumberland Compensation Appeal, Ex parte Shaw</i> , [1952] 1 K.B. 338	257n
<i>R. v. Noxzema Chemical Co. of Canada Ltd.</i> , [1942] S.C.R. 178	259n
<i>R. v. Ontario Fuel Board; Ex parte LaRocque</i> [1959] O.W.N. 91	253n
<i>R. v. Ontario Labour Relations Board; Ex parte</i> <i>Kitchener Food Market Ltd.</i> , [1966] 2 O.R. 513	317n
<i>R. v. Plowright</i> (1686), 3 Mod. 94; 87 E.R. 60	269n
<i>R. v. Public Accountants Council; Ex parte Stroller</i> , [1960] O.R. 631	1187n
<i>R. v. Recorder of Leicester, Ex parte Wood</i> , [1947] 1 All E.R. 928	257n
<i>R. v. Sadler</i> (1830), 4 Car. & P. 218	437n
<i>R. v. Snider</i> , [1954] S.C.R. 479	461n
<i>R. v. Souter</i> (1959), 123 C.C.C. 393	785n
<i>R. v. Summers</i> , [1952] 1 All E.R. 1059	1200n
<i>R. v. W. D. Morris Realty Limited</i> , [1943] Ex. C.R. 140	1058n

<i>R. v. Workman & Huculok</i> , [1963] 1 C.C.C. 297	818n
<i>R. v. Yuk</i> , [1962] O.R. 584	1104n
<i>Ramm & the Public Accountants Council for the</i> <i>Province of Ontario, Re</i> , [1957] O.R. 217	137n, 145n
<i>Rathbun v. Sawyer</i> , 15 Wend. 451 (1836)	1639
<i>Reference re The Adoption Act, The Children's Protection Act,</i> <i>The Children of Unmarried Parents Act, The Deserted</i> <i>Wives and Children's Maintenance Act</i> , [1938] S.C.R. 398 ..	1465n
<i>Reid, Ex parte</i> , [1954] O.W.N. 904	771n
<i>Reilly v. R.</i> , [1934] A.C. 176	1472n
<i>Ridge v. Baldwin</i> , [1964] A.C. 40	187n
<i>Robertson v. Baldwin</i> , 165 U.S. 275	1615
<i>Robertson and Rosetanni v. The Queen</i> , [1963] S.C.R. 651	1578
<i>Rodière</i> , 26 December 1925, Conseil d'Etat, 1065	1458n
<i>Roncarelli v. Duplessis</i> , [1959] S.C.R. 121	255n, 1094n, 1106n, 1542, 1573
<i>Rosenberg & Toronto Board of Health, Re</i> , [1939] O.W.N. 33; 1 D.L.R. 771	1104n
<i>Ross & Board of Commissioners of Police for the</i> <i>City of Toronto, Re</i> , [1953] O.R. 556	1130n
<i>Ross & Board of Commissioners of Police for the</i> <i>City of Toronto, Re</i> , [1953] O.R. 947	1131n
<i>Routh's Trustees v. Central Land Board</i> , 8 P. & C.R. 290	1053n
<i>Royal Commission on Windfall Oil & Mines Ltd., Re</i> , April 6, 1965, unreported	448n
<i>Ruhle</i> , 2 February 1928, Conseil d'Etat, 127	1440n
<i>Saporta</i> , October 12, 1956, Conseil d'Etat, 366	1456
<i>Saumur v. City of Quebec</i> , [1953] S.C.R. 299	1496
<i>Schumiatcher, Re</i> , [1963] S.C.R. 38	239n
<i>Scott v. Stansfield</i> (1868), L.R. 3 Exch. 220	47n
<i>Seabee Homes Ltd. v. Georgetown</i> , [1962] O.R. 286	266n
<i>Seaford Court Estates Ltd. v. Esher</i> , [1949] 2 K.B. 481	1613
<i>See v. City of Seattle</i> , 87 Sup. Ct. 1737 (1967)	415n
<i>Seereelall Jhuggroo v. Central Arbitration Board</i> , [1953] A.C. 151	85n
<i>Shapiro v. United States</i> , 335 U.S. 1 (1948)	1621, 1622
<i>Shaw, Ex parte; R. v. Northumberland Compensation Appeal</i> , [1952] 1 K.B. 338	257n
<i>Silverberg & Board of Commissioners of Police for the</i> <i>City of Toronto, Re</i> , [1937] O.R. 528	1129n, 1130n
<i>Singer, Re</i> , (1929), 37 O.W.N. 3 aff. (1930), 52 C.C.C. 243	436n, 441n, 442n
<i>Singleton v. United States</i> , 343 U.S. 944 (1952)	1619
<i>Smith v. East Elloe Rural District Council</i> , [1956] A.C. 736	273n
<i>Smith v. Galin</i> , [1956] O.W.N. 432	632n

<i>Smith v. Smith</i> , [1952] 2 S.C.R. 312	1200n, 1201n
<i>Smith's Case</i> (1670), 1 Vent. 65; 86 E.R. 46	267n
<i>Société Anonyme des Sucreries et Distilleries de Françières</i> , September 19, 1945, Conseil d'Etat, 353	1437n
<i>Société Bordeaux Export</i> , December 2, 1959, Conseil d'Etat, 641	1451n
<i>Société Bougrand et Dupin</i> , 1942, Conseil d'Etat, 335	1446n
<i>Société Chaigneau-Ancelin</i> , 11 July 1945, Droit Social, 154	1448n
<i>Société des Chaussures André</i> , June 18, 1947, Dalloz 1947, 356 ..	1437n
<i>Société des Concerts du Conservatoire</i> , 9 March 1951, Conseil d'Etat, 1951, 69	1441n, 1444n
<i>Société des Etablissements Edgar Brandt</i> , March 10, 1939, Conseil d'Etat, 155	1447n
<i>Société des Grandes Huileries Perrusson et des Fontaines</i> , 16 November 1956, Conseil d'Etat, 441	1431n
<i>Société Forces Motrice du Vercors</i> , 26 June 1931, Conseil d'Etat, 692	1440n
<i>Société Industrielle Commerciale d'Approvisionnement</i> , 12 February 1960, Conseil d'Etat, 103	1444n
<i>Société Industrielle des Produit Chimiques Bozet Malettra</i> , 11 February 1953, Conseil d'Etat, 62	1461n
<i>Société Intercopie</i> , 20 February 1953, Conseil d'Etat, 88	1455n
<i>Société La Grande Brasserie la Nouvelle Gallia</i> , 17 June 1938, Conseil d'Etat, 541	1450n
<i>Société Sabarot</i> , January 11, 1948, Conseil d'Etat, 260	1450n
<i>Société Sucrière de l'usine Sainte Marthe</i> , 22 May 1953, Recueil Arrêts, Conseil d'Etat, Tables, 500	1446n
<i>Soubiron-Poney</i> , 29 July 1953, Conseil d'Etat, Tables, 717	1459n
<i>Soulmagnon</i> , 19 June 1946, Conseil d'Etat, 410	1441n
<i>St. John v. Fraser</i> , [1935] S.C.R. 441	447n
<i>Stanwood v. Green</i> , Fed. Cas. No. 13,301 (1870)	1613
<i>Ste. Donge et Cie</i> , 14 January 1950, Conseil d'Etat, 365	1425n
<i>Sté Financière de Lyon</i> , 1 July 1949, Conseil d'Etat, 323	1461n
<i>Sté Française de Transports Gondrand Frères</i> , 11 May 1965, Conseil d'Etat, 202	1461n
<i>Sté La fusion des Gazs</i> , 14 January 1955, Conseil d'Etat, 23	1425n
<i>Ste. le Centre Electrique</i> , 23 juillet 1937, Conseil d'Etat, 772 ...	1425n
<i>Steven Polon Ltd. & Metropolitan Licensing Commission, Re</i> , [1961] O.R. 810	1104n
<i>Strousa, In re</i> , Fed. Cas. No. 13,548 (1871)	1613
<i>Syndic de défense des Chartrans</i> , 27 May 1827, Conseil d'Etat, 627	1435n
<i>Syndicat de Défense des Grands Vins de la Côte d'Or</i> , 24 July 1936, Dalloz 1937, 3e Partie, 41	1437n
<i>Syndicat d'Enseignement Agronomique et de Recherches Agricoles</i> , 22 March 1941, Conseil d'Etat, 46	1447n

- Syndicat des Cadres de l'Assurance*, 6 June 1947,
Conseil d'Etat, 2521449n
- Syndicat des Propriétaires de Forêts de Chêne-liège d'Algérie*,
7 February 1948, Conseil d'Etat, 741444n
- Syndicat Général des Ingenieurs Conseils*,
26 June 1959, Conseil d'Etat, 3961444n
- Syndicat Régional des Quotidiens d'Algérie*,
Revue de Droit Public, 19521434n
- Szabo & Metropolitan Toronto Licensing Commission, Re*,
[1963] 2 O.R. 4261128n
- Taburet*, 22 January 1937, Conseil d'Etat, 951435n
- Taylor v. Porter*, (1843) 4 Hill 1401642, 1643
- Tenenbaum et al & Toronto Board of Health, Re*,
[1955] O.R. 6221104n
- Terracher*, 28 June 1945, Sirey, IIIème Partie, 491448n
- Thomson Lumber & Building Materials Ltd. et al &*
Minister of Highways, Re, [1964] 2 O.R. 1751060n
- Toronto Newspaper Guild, Local 87 et al, Re*,
[1951] O.R. 435 aff. [1953] 2 S.C.R. 18137n, 140n
- Toronto v. Olympia Edward Recreation Ltd.*,
[1955] S.C.R. 4541465n, 1466
- Toronto and York, Re*, [1937] O.R. 117, affirmed [1938]
A.C. 415; 107 L.J.P.C. 43; [1938] 1 W.W.R. 45234n, 1465n
- Trassard*, 23 January 1957, Conseil d'Etat, 501430n
- Tuthill, In re*, (1900) 163 N.Y. 1331643
- Union de la Propriété Batie de France*,
29 December 1944, Sirey 1947, III Partie, 51445n
- United States v. Burr*, 25 Fed. Cas. 381612
- United States v. Coffey*, 198 F. 2d 438 (1952)1618n
- United States v. Kahriger*, 345 U.S. 22 (1953)1622
- United States v. Keegan*, 71 F. Supp. 623 (1947)840n
- United States v. Morton Salt Company*, 338 U.S. 632 (1950)407n
- United States v. Three Tons of Coal*, 28 Fed. Cas. 149, (1875)..1612n
- United States v. United States Gypsum Company*,
333 U.S. 364 (1948)292n
- United States v. White*, 322 U.S. 6941620
- Vaaro, Re*, [1933] S.C.R. 640239n
- Valley Improvement Co. Ltd. v. Metropolitan Toronto &*
Region Conservation Authority, [1961] O.R. 783 ...1041n, 1042n
- Vasnier*, June 1, 1953, Conseil d'Etat, 2541454n
- Veuve Perret*, 10 January 1940, Conseil d'Etat, 71461n
- Veuve Trompier-Gravier*, 5 May 1944, Dalloz 1945, III1435n
- Viguié*, June 26, 1946, Conseil d'Etat, 1791431n

<i>Villa</i> , 16 November 1956, Conseil d'Etat, 433	1437n
<i>Ville de Castelnaudary</i> , 19 February 1922, Dalloz Hébdomadaire 1931, 196	1441n
<i>Wagner</i> , November 2, 1939, Conseil d'Etat, 547	1431n
<i>Weber</i> , 26 November 1952, Conseil d'Etat, Recueil Tables, 786..	1430n
<i>Wilcox v. Township of Pickering et al.</i> , [1961] O.R. 739	1104n, 1348n, 1469n
<i>William Cory & Sons Ltd. v. City of London Corp'n., Re</i> ,	
[1951] 2 K.B. 476	1472n
<i>Wilson v. Esquimalt & Nanaimo Railway Company</i> , [1922] 1 A.C. 202	138n
<i>Wolfe v. Robinson</i> , [1961] O.R. 250 aff. [1962] O.R. 132	447n, 483n, 491n
<i>Wong Yang Sung v. McGrath</i> , 339 U.S. 33	153n
<i>Yaffe, Ex parte; Minister of Health v. The King</i> , [1931] A.C. 494	182n
<i>Yonge v. Toynbee</i> , [1910] 1 K.B. 215	1251n
Vol. 1, pp. 1-498: Vol. 2, pp. 499-956: Vol. 3, pp. 957-1332: Vol. 4, pp. 1333-1733	

TABLE OF STATUTES

Absentees Act, R.S.O. 1960, c. 2	Sched. A893n, 898n
s. 2675	Sched. B893n
Accounting for Fines & Forfeitures Act, Statutes of Upper Canada 1794, 34 Geo. III, c. 5869n	Administration of Justice Expenses Amendment Act, Ont. 1957, c. 1
Acquisition of Land (Authorization Procedure) Act, 1946, 9 & 10	s. 2890n
Geo. VI, c. 49321n, 1005n	Administration of Justice in Unorga- nized Tracts Act, C.S.U.C. 1859,
para. 15 to Sched. 11009n	c. 128883n
para. 16 to Sched. 11009n	Administration of Justice in Unorga- nized Tracts Act, R.S.O. 1877, c. 90
Act of Settlement, 1700, 12 & 13	s. 3885n
Wm. III, c. 246n, 1396n	Age Discrimination Act, Ont. 1966,
Administration of Criminal Justice Act, 1826, 7 Geo. IV, c. 64849n	c. 311n
Administration of Justice Act, Statutes of the Province of Canada 1853,	s. 6477
16 Vict., c. 176	Agricultural Research Institute of Ontario Act, Ont. 1961-62, c. 1
ss. 1, 3 & 5606n	s. 13984n
Administration of Justice Act, Ont. 1873, c. 8	Agricultural Societies Act, R.S.O. 1960,
s. 56517n	c. 11
Administration of Justice Expenses Act, Ont. 1910, c. 41890n	s. 2231n
s. 14890n	s. 21966, 975, 987, 994
s. 41890n	s. 31403n, 428n
Administration of Justice Expenses Act, R.S.O. 1914, c. 96890n	s. 33348n
Administration of Justice Expenses Act, R.S.O. 1927, c. 126890n	Air Pollution Control Act, R.S.O. 1960,
Administration of Justice Expenses Act, R.S.O. 1937, c. 141890n	c. 12 (superseded by Air Pollution Control Act, Ont. 1967, c. 2) . .1099n
Administration of Justice Expenses Act, R.S.O. 1960, c. 5 . .890n, 892n, 908n	ss. 4, 7657n, 673
ss. 1, 2, 6893n	Appointment of Parish and Town Offices Act, Statutes of Upper Canada 1793, 33 Geo. III, c. 2 .868n
s. 11861n, 894n	Apprenticeship and Tradesmen's Quali- fication Act, Ont. 1964, c. 3
s. 13894n	s. 7393n
s. 17(1)893n, 898n	s. 18346n, 946n
s. 17(2)893n	Appropriation of Fines Act, Statutes of Upper Canada 1830, 11 George IV,
s. 19894n, 898n	c. 1873n
s. 20617n, 766n, 894n	Appropriation of Fines Act, C.S.U.C. 1859, c. 118881n
s.s. 21, 22894n	Approved Impartial Referees and Arbi- trators Act, Ont. 1961-62, c. 5 .715n
s. 24477	s. 5675
s. 27895n	

Vol. 1, pp. 1-498: Vol. 2, pp. 499-956: Vol. 3, pp. 957-1332: Vol. 4, pp. 1333-1733

Arbitrations Act, R.S.O. 1960, c. 18	
s. 16	673, 675
s. 22	673
s. 26	673, 677
Architects Act, R.S.O. 1960,	
c. 20	1160n, 1170n, 1188n, 1206n, 1218A, 1219
s. 7	1176n
s. 9	1212
s. 12	1213
s. 19	466
s. 21	675
Army Act, 1955, 3 & 4 Eliz. II, c. 18	
s. 101	445n
Artificial Insemination of Cattle Act, Ont. 1962-63, c. 5	
s. 11	349n
Assessment Act, R.S.O. 1960, c. 23.	655n
s. 75 as amended by Ont. 1961-62,	
c. 6, s. 7	656n, 681n
s. 83 as amended by Ont. 1961-62,	
c. 6, s. 8 and further amended by Ont. 1966, c. 10, s. 15	656n
s. 84	656n
s. 241	915n
Assessment and Rates Act, Statutes of Upper Canada 1793, 33 Geo. III,	
c. 3	868n
Athletics Control Act, R.S.O. 1960, c. 26	
s. 4	352n
s. 5	80n
s. 7	466
Attorney General Act, R.S. Nfld. 1952,	
c. 9	952n
s. 9	953n
Attorney-General's Department Act, R.S.Q. 1964, c. 19	953n
s. 1	954n
Barristers Act, R.S.O. 1960,	
c. 30	1160n, 1206n
s. 2	1176n
Bees Act, R.S.O. 1960, c. 33	
s. 5	90n, 101n
Bill of Rights, 1689	351
Blind Persons' Allowances Act, R.S.O.	
1960, c. 35	1137n
Boilers and Pressure Vessels Act, Ont.	
1962-63, c. 8	
s. 7	428n
Boundaries Act, R.S.O. 1960, c. 38	
s. 4	466
s. 12(3) as re-enacted by Ont.	
1961-62, c. 9, s. 4	673
s. 13	673
British North America Act 1867, 30 & 31 Vict., c. 3	32n
Preamble	1598
ss. 49, 87, 90	35n
s. 91 as amended by 3 & 4 Geo. VI,	
c. 36, s. 1, adding item 2-A	1538n
ss. 91-95	1491
s. 91(7)	962n
s. 91(24)	503n
s. 91 (27)	838n, 883n
s. 92	32
s. 92(1)	1598, 1601
s. 92(9)	1098n
s. 92(10)(c)	1547
s. 92(13)	388n
s. 92(14)	503n, 504n, 510n, 883n, 1401
s. 92(15)	503n, 883n
s. 96	33, 34, 510, 1465n
s. 97	1465n
s. 99	1395
s. 99(2) as amended by Can.	
1960, c. 2, s. 1	47n, 683n
s. 100	510n
s. 101	504n
s. 121	1491n, 1536n
s. 126	43n
s. 133	1491n, 1536n
ss. 134, 135	931n
Broadcasting Act, Can. 1967-8,	
c. 25	1550, 1552, 1583
s. 2	1548-50
s. 15	1548
Brucellosis Act, Ont. 1965, c. 10	
s. 11	349n

- California Government Code, s. 11,
509166n
- California Penal Code, ss. 4900-06
(1913)837n
- California Penal Code, s. 13601 enacted
by 1965 (Cal.) c. 1395, s. 1852n
- Canada Elections Act, Can. 1960, c. 39
s. 141235n
- Canada Evidence Act, R.S.C. 1952, c. 307
s. 4(2) as amended by Can. 1953-54,
c. 51, s. 749815n
- s. 4(3)816n
- s. 5216n
- s. 36813n
- Canadian Bill of Rights, Can. 1960,
c. 444n, 1539-40, 1552,
1562, 1578, 1597
- s. 21551
- Cancer Act, R.S.O. 1960, c. 45
s. 13966, 975, 982n, 984n,
985n, 988, 994
- Cemeteries Act, R.S.O. 1960, c. 47..1243
s. 19466
- s. 40966, 975, 987, 989, 990n, 994
- s. 61966, 975n, 989, 994
- s. 82915n
- Certification of Titles Act, R.S.O. 1960,
c. 48
s. 3466
- ss. 9, 13673
- s. 13673
- Chancery Act, R.S.O. 1877, c. 40
s. 16886n
- Charitable Gifts Act, R.S.O. 1960, c. 50
s. 7397n, 466
- Charities Accounting Act, R.S.O. 1960,
c. 52
s. 6467
- Chartered Shorthand Reporters' Act,
R.S.O. 1937, c. 234799n
- Child Welfare Act, Ont. 1965,
c. 14551, 552, 1243
- ss. 36, 64672, 675
- Children's Institutions Act, Ont.
1962-63, c. 14415n
- Children's Maintenance Act, R.S.O.
1960, c. 55551, 552
- Chiropody Act, R.S.O. 1960,
c. 571160n, 1195, 1206n,
1218A, 1220
- s. 21164n, 1212
- s. 31164n, 1213
- City of Toronto Incorporation Act,
Statutes of Upper Canada 1834,
4 Will. IV, c. 23871n, 874n
- Civil Aviation (Licensing) Act 1960,
8 & 9 Eliz. II, c. 38
s. 21106n
- Civil Code, (Quebec 1931)
Article 407963n
- Civil Code, Vol. 2 (Quebec 1965)
s. 308820n, 821n
- Collection Agencies Act, R.S.O. 1960,
c. 58
s. 6(3) as enacted by Ont. 1964,
c. 7, s. 41125n
- s. 6(3a) as enacted by Ont. 1964,
c. 7, s. 41105n, 1125n
- s. 6a(2) as enacted by Ont. 1964,
c. 7, s. 51125n
- s. 6c as enacted by Ont. 1964,
c. 7, s. 51125n
- s. 19a as enacted by Ont. 1964,
c. 7, s. 7389n
- s. 23a as enacted by Ont. 1964,
c. 7, s. 9389n, 420n, 428n,
438n, 459n
- s. 23d as enacted by Ont. 1964,
c. 7, s. 9673
- s. 26 as re-enacted by Ont. 1964,
c. 7, s. 11675
- Combines Investigation Act, R.S.C. 1927,
c. 26
s. 22436n
- Combines Investigation Act, R.S.C. 1952,
c. 314
s. 17408n, 444n
- s. 18408n
- Combines Investigation Act, Can. 1960,
c. 45
s. 17505n, 611n

Common Law Procedures Act, C.S.U.C. 1859, c. 22	s. 60675
.....877n	s. 75915n
Common Law Procedures Act, Ont. 1867, c. 28	Conveyancing and Law of Property Act, R.S.O. 1960, c. 66
s. 9690n	ss. 38, 62675
Community Psychiatric Hospitals Act, Ont. 1960-61, c. 9	Coroners Act, Ont. 1948, c. 17
.....1231n	ss. 2, 3486n
Commuter Services Act, Ont. 1965, c. 17,	Coroners Act, R.S.O. 1960, c. 69
s. 4 as amended by Ont. 1966, c. 19,	s. 1483n
s. 1966, 976, 981n, 989, 994	s. 2485n
Conservation Authorities Act, R.S.O. 1960, c. 62	s. 2(1) as amended by Ont. 1960-61, c. 12, s. 2(1)486n
s. 17967, 976, 994	s. 3485n, 897n
s. 20 as amended by Ont. 1962-63,	s. 5483n, 485n
c. 20, s. 4946n	s. 7(1 as amended by Ont. 1960-61, c. 12, s. 3487n
s. 20a as enacted by Ont. 1960-61,	ss. 10, 12, 13, 15485n
c. 10, s. 1349n, 946n	s. 18493n
ss. 25, 28675	s. 22 as amended by Ont. 1965, c. 20, s. 8493n
Consolidated Municipal Act, Ont. 1922, c. 72	s. 23485n
s. 332 as re-enacted by Ont. 1927,	s. 25(1) as amended by Ont. 1965, c. 20, s. 10494n
c. 61, s. 31705n	s. 25(2)494n, 477
Constitution of France, 1958	s. 25(3) as amended by Ont. 1966, c. 27, s. 7494n
art. 341432, 1433	s. 25(4)440n, 495n
art. 371433	s. 32 as amended by Ont. 1960-61, c. 12, s. 11797n, 806n, 908n
Constitutional Act, Statutes of Upper Canada 1798, 38 Geo. III, c. 5. .867n	s. 36897n
Constitutional Questions Act, R.S.O. 1960, c. 64	s. 37485n
s. 6675	s. 37(1a) as enacted by Ont. 1965, c. 20, s. 13897n
Construction Hoists Act, Ont. 1960-61, c. 11	s. 37(4)857n
s. 6 as amended by Ont. 1961-62,	s. 37(5)862n
c. 17, s. 1428n	s. 37(6) as amended by Ont. 1966, c. 27, s. 9806n
Construction Safety Act, Ont. 1961-62, c. 18	s. 38485n, 806n, 857n, 897n, 898n
s. 1792n, 93	s. 39909n
s. 23915n	s. 40897n
s. 24346n	s. 43485n
Consumer Protection Act, Ont. 1966, c. 23	Sched. B as amended by Ont. 1960-61, c. 12, s. 14 & by Ont. 1965, c. 20, s. 14857n
s. 12673	Sched. D485n
Controverted Elections Act, R.S.O. 1960, c. 65	
s. 58675, 677	

Coroners Amendment Act, Ont. 1913, c. 21 s. 1486n	County Courts Equity Act, Statutes of the Province of Canada 1853, 16 Vict., c. 119 s. 2607n
Coroners Amendment Act, Ont. 1936, c. 12 s. 2486n	County Courts Procedure Act, Statutes of the Province of Canada 1856, 19 & 20 Vict., c. 90 s. 20607n
Corporations Act, R.S.O. 1960, c. 71 s. 12672, 673 s. 326(1e) as enacted by Ont. 1962-63, c. 24, s. 11675 s. 338675	County and District Courts Act, Ont. 1910, c. 30 ss. 21, 22, 23608n
Corporations Tax Act, R.S.O. 1960, c. 73 s. 80673 s. 84675 s. 86397n, 406n, 408n, 412n, 416n, 417n, 422n, 467 s. 90460n	County Judges Act, Ont. 1909, c. 29 s. 16a as enacted by Ont. 1910, c. 26, s. 13691n
Costs of Distress Act, R.S.O. 1960, c. 74 s. 6672	County Judges Act, Ont. 1919, c. 26 s. 5691n, 692n, 701n
County Attorneys Act, C.S.U.C. 1859, c. 106880n	County Judges Act, R.S.O. 1960, c. 77 s. 6898n s. 9(1-5) as amended by Ont. 1962-63, c. 28, s. 1694n, 722n, 909n s. 9(6-7)720n s. 13 as amended by Ont. 1961-62, c. 25, s. 8801n, 802n, 898n s. 14898n s. 16 as re-enacted by Ont. 1961-62, c. 25, s. 9614n, 718n s. 22802n
County Attorneys, General Fee Fund Act, C.S.U.C. 1859, c. 20877n	Court of Appeal Act, R.S.O. 1877, c. 38 ss. 11, 55885n
County Courts Act, Statutes of the Province of Canada 1850, 13 & 14 Vict., c. 52 s. 1607n	Court of Chancery Act, Statutes of Upper Canada 1837, 7 Will. IV, c. 2874n
County Courts Act, C.S.U.C. 1859, c. 15877n	Court of Chancery Act, Statutes of Upper Canada 1838, 1 Vict., c. 14874n
County Courts Act, R.S.O. 1877, c. 43 s. 4886n s. 19607n	Court of Chancery Act, C.S.U.C. 1859, c. 12 ss. 11, 12876n
County Courts Act, Ont. 1896, c. 19 ss. 2, 3607n	Court of Claims Act, McKinney Con. Laws of N.Y., Book 29A, Part 2 s. 9(3a)837n
County Courts Act, R.S.O. 1960, c. 76655 s. 3 as amended by Ont. 1965, c. 23, s. 1909n s. 19 as amended by Ont. 1961-62, c. 24, s. 5607n, 609n s. 20609n s. 381063n	Court of Error and Appeal Act, C.S.U.C. 1859, c. 13 s. 65877n
County Courts Amendment Act, Ont. 1949, c. 19 s. 1608n	

Court of King's Bench Act, Statutes of Upper Canada 1822, 2 Geo. IV, c. 1 ss. 30, 45	872n
Courts of King's Bench Act, Statutes of Upper Canada 1837, 7 Will. IV, c. 1	873n
Court Reporters Act, R.S.N.S. 1954, c. 63	812n
Courts of Assize and Nisi Prius and of Oyer and Terminer and General Gaol Delivery Act, R.S.O. 1877, c. 41 ss. 13, 16, 17	886n
Credit Unions Act, R.S.O. 1960, c. 79 s. 50	467
s. 52 as amended by Ont. 1964, c. 14, s. 12	675
Creditors' Relief Act, R.S.O. 1960, c. 78 s. 38	656n, 675
Criminal Accounts Payable by Counties Act, R.S.O. 1887, c. 84	890n
Criminal Accounts Payable by Counties Act, R.S.O. 1897, c. 102	890n
Criminal Code, 1892, 55 & 56 Vict., c. 29	884n
s. 550	547n
Criminal Code, R.S.C. 1927, c. 36 ..	1510
s. 10	884n
ss. 735, 1044	532n
Criminal Code, Can. 1953-54, c. 51	18, 416, 731
s. 2	746n
ss. 7, 8	884n
ss. 12, 13	1519n
s. 30	728n
s. 96	426n
s. 110	848n, 849n
s. 119	749n
ss. 139, 143, 144	1519n
ss. 157, 186	552, 554n
s. 222	506n
s. 231	552, 554n
s. 247	756n
s. 373	847n
s. 413	505n, 755n
s. 432	408n
s. 434	848n, 851n

s. 435	728n
s. 436	848n, 851n
s. 437	728n, 848n
s. 438	746n
s. 439	725n
s. 440	739n
s. 448	491n
ss. 449, 450	755n
s. 451	756n, 1236n
s. 453 as amended by Can. 1960, c. 37, s. 2	797n
s. 455	756n
s. 460	770n
s. 465	774n
s. 467	505n, 506n, 797n
s. 468	505n, 797n
s. 471	797n
ss. 477, 480	505n
s. 486	777n
s. 487	505n, 506n
s. 508	617n, 765n, 923n
s. 524	1236n
ss. 542, 547	764n
s. 555 as amended by Can. 1960, c. 37, s. 3	797n
ss. 583, 584	509n
s. 588	797n
ss. 597, 597A, 598	509n
s. 626	914n
ss. 628, 629, 630	847n
s. 631	533n
s. 638	847n
s. 695	725n
s. 700	746n
s. 708	797n
s. 710	1236n
s. 714	847n
s. 716	533n, 833n
s. 717	552
s. 719	753
s. 720 as amended by Can. 1959, c. 41, s. 34	508n, 783n, 785n
s. 722	785n
s. 724	753, 869n
s. 730	787n, 833n
s. 731	787n

s. 734	783n	Dental Technicians Act, R.S.O. 1960,	
s. 735	784n	c. 90	1160n, 1204n, 1205n, 1206n, 1218A, 1220
s. 743 as amended by Can. 1959, c. 41,		s. 2	1164n, 1212
s. 38 and further amended by Can.		s. 3	1213
1960-61, c. 43, s. 45	791n, 792n	Dentistry Act, R.S.O. 1960,	
743(1)	508n	c. 91	1160n, 1165n, 1167n, 1168n, 1170n, 1171n, 1194, 1195, 1205n, 1206n, 1214, 1218A, 1221
743(3)	834n	s. 1	1220
744	523n, 533n, 861n, 901n	s. 4 as amended by Ont. 1966,	
Criminal Injuries Compensation Act,		c. 38, s. 5	1167, 1212
Sask. 1967, c. 84	846n	s. 11	1164n
Criminal Injuries Compensation Act,		s. 12	1167n, 1176n
1963 (N.Z.), c. 134	846n	s. 23	915n
Criminal Justice Administration Act,		s. 24	1220
1962, 10 & 11 Eliz. II, c. 15		s. 25	1188n, 1196n, 1197n
s. 15	617n	s. 27 as re-enacted by Ont. 1966,	
Criminal Justice Act, 1967, 15 & 16		c. 38, s. 14	656n, 675
Eliz. II, c. 80		s. 29	1207n
s. 3	758n	Department of Education Act, R.S.O.	
Criminal Law of England Introduction		1960, c. 94	
Act, Statutes of Upper Canada 1800,		s. 11	465n, 467
40 Geo. III, c. 1	874n, 883n	Department of Financial and Commer-	
Crown Attorneys Act, R.S.O. 1960, c. 82		cial Affairs Act, Ont. 1966, c. 41	
s. 1(1) as amended by Ont. 1964,		s. 4	935n
c. 15, s. 1	941n	s. 5	420n
s. 1(2) as amended by Ont. 1967,		Department of Labour Act, R.S.O. 1960,	
c. 18, s. 1	941n	c. 97	
s. 6	940n	s. 8	357n
s. 7 as amended by Ont. 1962-63,		s. 9	467
c. 29, s. 2	909n	s. 11 as amended by Ont. 1962-63,	
ss. 8, 9	898n	c. 33, s. 2	91n, 143
ss. 12, 14	940n	Department of Municipal Affairs Act,	
s. 16	898n, 940n	R.S.O. 1960, c. 98	
s. 17	940n	s. 1	1035n
s. 18	534n	s. 19	468
Crown Timber Act, R.S.O. 1960, c. 83		s. 55	672
s. 23	672	Dependants' Relief Act, R.S.O. 1960,	
s. 50	344n	c. 104	
Crown Witnesses Act, R.S.O. 1877,		s. 12	675
c. 87	887n	Deposits Regulation Act, Ont. 1962-63,	
Crown Witnesses Act, R.S.O. 1960, c. 84		c. 36	
ss. 2, 3	861n	s. 5	441n, 477
s. 10	899n	s. 8	347n
Dead Animal Disposal Act, R.S.O. 1960,			
c. 88			
s. 11 as amended by Ont. 1961-62,			
c. 28, s. 6	340n		

Deserted Wives' and Children's Maintenance Act, Ont. 1922, c. 57	
s. 3	558n
Deserted Wives' and Children's Maintenance Act, R.S.O. 1960,	
c. 105	551, 552, 556n
ss. 1, 2	556n
s. 13	561n
Detention of Debtors Act, Statutes of Upper Canada 1829, 10 Geo. IV,	
c. 2	874n
Direct Legislation Act, R.S.A. 1955,	
c. 83	1605
Disabled Persons' Allowances Act, R.S.O. 1960, c. 107	1137n
District Courts Act, Statutes of Upper Canada 1794, 34 Geo. III, c. 3	606n
District Courts Act, Statutes of Upper Canada 1822, 2 Geo. IV, c. 2	
s. 28	872n
District Courts Act, Statutes of the Province of Canada 1845, 8 Vict., c. 13	
s. 5	607n
District Courts and Courts of Requests Act, Statutes of Upper Canada 1797, 37 Geo. III, c. 6	
ss. 1, 2, 3	607n
Division Courts Act, C.S.U.C. 1859,	
c. 19	877n
Division Courts Act, R.S.O. 1877, c. 47	
s. 47	886n
Division Courts Act, R.S.O. 1960,	
c. 110	621n, 642n, 655, 900n
s. 1(h) as re-enacted by Ont. 1961-62,	
c. 35, s. 1	625n, 643n
s. 8	630n
s. 11a as enacted by Ont. 1961-62,	
c. 35, s. 2	625n
ss. 12, 13	625n
s. 15	631n
ss. 18, 20	627n
s. 30	628n
s. 31	630n
ss. 32, 33	628n
s. 53	622n

s. 54(a) as re-enacted by Ont. 1965,	
c. 32, s. 2(1)	622n
s. 55	631n
s. 57	622n
s. 58	633n
ss. 64, 65, 69	623n
s. 70	624n
ss. 81, 82, 83, 85, 86, 88, 90	632n
s. 92 as amended by Ont. 1964,	
c. 25, s. 1	797n, 806n
ss. 97, 98, 99	632n
s. 100	631n
s. 102	632n
s. 104 as amended by Ont. 1964,	
c. 25, s. 2(1)	632n
s. 106	633n
s. 108 as amended by Ont. 1964,	
c. 25, s. 3	633n, 656n
s. 112	633n, 656n
ss. 115, 125	640n
s. 130	633n
s. 131	633n, 637n
s. 132	637n, 639n
ss. 134, 136, 137, 140	638n
ss. 142, 143, 144, 151, 152,	
153, 154	633n
s. 156 as amended by Ont. 1961-62,	
c. 35, s. 5	633n
ss. 157, 159	633n
s. 161 as amended by Ont. 1961-62,	
c. 35, s. 6	633n
s. 163 as amended by Ont. 1961-62,	
c. 35, s. 7	633n
ss. 164, 165, 167, 168, 182,	
183, 184, 185	634n
s. 186(1)(2) as amended by Ont.	
1962-63, c. 38, s. 2	634n
ss. 187, 188, 192	634n
s. 193	635n
ss. 194, 195	634n
s. 196	635n, 857n
s. 197	629n, 635n
s. 206	634n
s. 214 as re-enacted by Ont. 1961-62,	
c. 35, s. 8	622n, 631n

Dower Act, R.S.O. 1960, c. 113	Evidence Act, R.S.O. 1960, c. 125...
s. 31	s. 9
Drainage Act, Ont. 1962-63, c. 39	ss. 10, 11
ss. 19, 23, 32	Expenditure of County Funds Act,
ss. 67, 68	R.S.O. 1877, c. 85
s. 83	ss. 1, 2
Drugless Practitioners Act, R.S.O. 1960,	s. 4
c. 1141160n, 1194, 1206n,	Expenditure of Monies Act, Statutes
1218A, 1221, 1222	of Upper Canada 1822, 2 Geo. IV,
s. 2	c. 13
ss. 4, 5	Expenses of the Administration of
s. 6	Justice Act, Statutes of Upper
	Canada 1823, 4 Geo. IV, c. 25 ..
Egress from Public Buildings Act, R.S.O.	Expenses of the Administration of
1960, c. 116	Justice Act, Statutes of Upper
s. 3	Canada 1831, 1 Will. IV,
Election Act, R.S.O. 1960,	c. 14
c. 118440, 1253n	Expenses of the Administration of
s. 16	Justice Act, Statutes of the Province
s. 133	of Canada 1846, 9 Vict., c. 58 ..
s. 142	Expenses of the Administration of
Elevators and Lifts Act, R.S.O. 1960,	Justice Act, R.S.O. 1887, c. 86. .
c. 119415n, 1117n	Expenses of the Administration of
s. 9 as amended by Ont. 1961-62,	Justice Act, R.S.O. 1897, c. 104.
c. 38, s. 2	Expenses of the Administration of
Embalmers and Funeral Directors Act,	Justice in Criminal Matters Act,
R.S.O. 1960, c. 120....1160n, 1175n,	C.S.U.C. 1859, c. 120
1194, 1206n, 1218B, 1222	ss. 1, 2, 3
s. 2	Expenses of the Administration of
s. 16	Justice in Criminal Matters Act,
s. 21	R.S.O. 1877, c. 86
s. 23	s. 1
Emergency Measures Act, Ont. 1962-63,	Expropriation Procedures Act, Ont.
c. 41	1962-63, c. 43
s. 6a as enacted by Ont. 1965,	s. 1
c. 36, s. 4	961n, 962n, 965n,
Employment Agencies Act, R.S.O. 1960,	1014n, 1016n, 1064n
c. 121	s. 1a as enacted by Ont. 1966,
s. 6	c. 53, s. 1232n, 675, 988, 990n,
Energy Act, Ont. 1964, c. 27	991n, 993n, 1011n, 1087n
s. 2	s. 2
s. 3	s. 4
s. 10	s. 5 ..
Evidence Act, R.S.N. 1952, c. 120	s. 8
s. 6	s. 9 as re-enacted by Ont. 1965,
	c. 38, s. 2

s. 9a as enacted by Ont. 1965,	
c. 38, s. 2	1017n, 1018n, 1019n, 1020n, 1050n, 1058n
s. 10 as re-enacted by Ont. 1965,	
c. 38, s. 2	1031n, 1035n, 1036n, 1040n, 1050n, 1063n, 1066, 1067, 1068, 1069
s. 11	675, 1046n, 1062n, 1063, 1064n, 1070, 1071
s. 12	1011n, 1017n
s. 13	1068, 1069, 1070, 1071
s. 18	1024n, 1027n
s. 19	1024n, 1025n
s. 21	1072n
Extra-Judicial Services Act, Ont. 1910,	
c. 29	
s. 2	690n
Extra-Judicial Services Act, Ont. 1955,	
c. 20	710n
Extra-Judicial Services Act, R.S.O. 1960,	
c. 128	706n, 722n
s. 1 as amended by Ont. 1964,	
c. 29, s. 1	690n
s. 2	710n, 711n
Factory, Shop and Office Building Act,	
R.S.O. 1960, c. 130	
s. 53	207n
Family Benefits Act, Ont. 1966,	
c. 54	1136n, 1139n
s. 1	1140, 1146n
s. 3	1145, 1146
s. 5	1146
s. 7	1140, 1146, 1147
s. 8	1141, 1157
s. 11	1137n, 1151, 1156
as amended by Ont. 1968, c. 39,	
s. 2	1384
s. 12	1146, 1147
s. 13	1140n, 1141, 1147
s. 14	1137n, 1138
Farm Loans Adjustment Act, R.S.O.	
1960, c. 134	
s. 4	468
s. 6	343n

Farm Products Grades and Sales Act,	
R.S.O. 1960, c. 136	
s. 6	424n
Farm Products Marketing Act, R.S.O.	
1960, c. 137	358n, 1099n, 1105n, 1117n
s. 4(1) as amended by Ont. 1962-63,	
c. 45, s. 3(1)	462n
s. 4(2)	468
s. 9	350n
s. 18 as enacted by Ont. 1962-63, c. 45,	
s. 11 & amended by Ont. 1965, c. 39,	
s. 5 & further amended by Ont. 1966,	
c. 56, s. 2	1105n, 1108n, 1109n
Farmers' Creditors Arrangement Act,	
Can. 934, c. 53	
s. 6	251n
Federal Administrative Procedure Act,	
60 Stat. 237 (1946) ; 5 U.S.C.A. §.1001	
et seq. (1946)	149, 151, 152, 153, 158, 160, 161, 164, 176, 301n
s. 2	162n
s. 3	159
s. 5	162, 178n, 180n, 181n
s. 6	177n, 179n
s. 7	168, 177n, 178n, 179n, 180n
s. 8	180n
s. 9	180n, 1122n
s. 10	298n, 299n, 300n
Federal Trade Commission Act	322
Fees in Administration of Justice Act,	
R.S.O. 1897, c. 101	890n
Fees of Clerks of the Peace Act, Statutes	
of Upper Canada 1807, 47 Geo. III,	
c. 11	871n
Fees of Counsel Act, C.S.U.C. 1859,	
c. 119	881n
ss. 1, 4, 5, 7, 11, 12	882n
Fees of Counsel and Other Officers in	
the Administration of Justice Act,	
R.S.O. 1877, c. 84	887n
s. 1	888n
s. 2	886n, 888n
s. 5	888n

Financial Administration Act, R.S.C. 1952, c. 116 s. 22353n	Gaol and Court House Act, Statutes of Upper Canada 1822, 2 Geo. IV, c. 21872n
Financial Administration Act, R.S.O. 1960, c. 14243n	Gaol and Court House Act, Statutes of Upper Canada 1823, 4 Geo. IV, c. 23873n
Fines and Forfeitures Act, R.S.O. 1960, c. 143 ss. 2, 4919n	Gas and Oil Leases Act, Ont. 1962-63, c. 49 s. 7675
Fire Marshals Act, R.S.O. 1960, c. 148442 ss. 4, 5468 s. 13402n, 436n, 441n, 478, 945n s. 14405n s. 19 as amended by Ont. 1960-61, c. 29, s. 1657n, 672	Gasoline Handling Act, R.S.O. 1960, c. 161 s. 394n Gasoline Handling Act, Ont. 1966, c. 61 s. 5344n Gasoline Tax Act, R.S.O. 1960, c. 162 s. 2 as amended by Ont. 1964, c. 36, s. 1351n s. 3351n, 434n, 469 s. 6 as amended by Ont. 1964, c. 36, s. 2460n
Forest Fires Prevention Act, R.S.O. 1960, c. 152 s. 23418n	General Laws of Massachusetts, 1921, c. 277 s. 73838n
Fraudulent Debtors Arrest Act, R.S.O. 1960, c. 155 s. 24675	General Sessions Act, R.S.O. 1877, c. 44 s. 11886n General Sessions Act, R.S.O. 1960, c. 163 s. 3617n s. 4a as enacted by Ont. 1965, c. 44, s. 2616n
Game and Fish Act, Ont. 1961-62, c. 48737 s. 1734n s. 6967, 976, 994, 1000n s. 8(1) as amended by Ont. 1966, c. 60, s. 1425n s. 8(2)390n s. 9734n s. 15(1)(2) as amended by Ont. 1966, c. 60, s. 4(1)(2)735n s. 15(3)735n s. 381099n s. 78 as amended by Ont. 1966, c. 60, s. 9738n s. 84 as amended by Ont. 1962-63, c. 48, s. 7 & further amended by Ont. 1966, c. 60, s. 11734n	General Welfare Assistance Act, R.S.O. 1960, c. 1641137n Grain Elevator Storage Act, R.S.O. 1960, c. 167 s. 17410n
Gaol Act, Statutes of Upper Canada 1837, 7 Will. IV., c. 40873n	Habeas Corpus Act, England1597 Habeas Corpus Act, R.S.O. 1960, c. 169 s. 5239n s. 8668n, 675
Gaol and Court House Act, Statutes of Upper Canada 1792, 32 Geo. III, c. 8868n	Haliburton Act, R.S.O. 1960, c. 170 s. 13672 Highway Improvement Act, R.S.O. 1960, c. 171 s. 7967, 976, 994, 1013n, 1077n s. 34675 s. 36339n

s. 37	675	Illinois Annual Statutes, c. 37, s. 4378(c)	
s. 66	967, 976, 994	(Smith-Hurd Supp. 1960)	837n
ss. 93, 94	675	Income Tax Act, R.S.C. 1952, c. 148	
s. 96	672, 675	s. 126	394n, 397n, 412n
Highway Traffic Act, R.S.O. 1960,		Income Tax Act, Ont. 1961-62, c. 60	
c. 172	728n, 737, 748, 828n	s. 19	673
s. 7	729n	s. 23	675
s. 13	1094n, 1099n	s. 34	470
s. 25b as enacted by Ont. 1965,		s. 42 as re-enacted by Ont. 1964,	
c. 46, s. 5	672	c. 104, s. 7	460n
ss. 43, 71	871n	Income Tax Agreement Act, Ont.	
s. 143	828n, 829n, 832n	1962-63, c. 62	
s. 151	911n, 916n	s. 1	675
s. 156	729n, 741n	Increase of Revenue Act, Statutes of	
s. 156(2) as amended by Ont. 1964,		Upper Canada 1797, 37 Geo. III,	
c. 38, s. 16	729n	c. 11	870n, 873n
s. 159 as enacted by Ont. 1961-62,		Industrial Safety Act, Ont. 1964, c. 45	
c. 52, s. 17	729n	s. 8	418n, 470
Horticultural Societies Act, R.S.O. 1960,		Industrial Standards Act, R.S.O. 1960,	
c. 175		c. 186	80n
s. 2	268n	s. 3	470
Hospital Services Commission Act,		s. 12	343n
R.S.O. 1960, c. 176		Infants Act, R.S.O. 1960, c. 187	
s. 14	411n	s. 21	675
Hospital Subsidy Disputes Arbitration		Inquiries Act, R.S.C. 1952, c. 154 ..	463n
Act, Ont. 1965, c. 48		s. 13	451n, 464
s. 5	271n	Insurance Act, R.S.O. 1960, c. 190	
Hospitals and Charitable Institutions		s. 4	478
Inquiries Act, R.S.O. 1960,		s. 11	230n
c. 177	390	s. 12	230n, 675
s. 1	389n, 391n, 469	s. 41	230n
Hospitals Tax Act, R.S.O. 1960, c. 178		s. 60	673
s. 13	395n, 396n, 469	s. 88	347n
s. 34	460n	ss. 268, 338, 339	675
Hotel Fire Safety Act, R.S.O. 1960, c. 179		Interpretation Act, R.S.O. 1960, c. 191	
s. 23 as amended by Ont. 1960-61,		s. 27	86n, 411n, 433n, 1155n
c. 36, s. 1	672	Investment Contracts Act, R.S.O. 1960,	
s. 27	345n	c. 194	
Hours of Work and Vacations with Pay		s. 15	675
Act, R.S.O. 1960, c. 181		s. 25	340n
s. 7	469	Jails Act, R.S.O. 1960, c. 195	
s. 10	346n	s. 8a as enacted by Ont. 1961-62,	
Housing Development Act, R.S.O. 1960,		c. 64, s. 1	912n, 925n
c. 182		s. 9	778n
s. 7	967, 976, 994	ss. 14, 15	912n

Judges Act, R.S.C. 1952,

- c. 159684n, 722n
- s. 7 as amended by Can. 1963,
- c. 8, ss. 1, 2683n
- s. 19 as amended by Can. 1963,
- c. 8, s. 5683n
- s. 20(1) as re-enacted by Can. 1966-67,
- c. 76, s. 1(2)685n
- s. 20(2)(a) as enacted by Can. 1966-67,
- c. 76, s. 1(2)695n
- s. 21 as amended by Can. 1960, c. 46,
- s. 2 & re-enacted by Can. 1966-67,
- c. 76, s. 3683n, 686n
- s. 26 as re-enacted by Can. 1966-67,
- c. 76, s. 3683n
- s. 31(1)1396n
- ss. 32, 331395n
- s. 36519n, 1396n
- s. 37687, 688
- s. 38(1) as re-enacted by Can. 1966-67,
- c. 76, s. 5686n, 688, 689, 707
- s. 38(3)686n, 687, 688, 707
- s. 39(1) as re-enacted by Can. 1966-67,
- c. 76, s. 6(1)686n, 687, 688,
- 689, 690, 707

Judges Amendment Act, Can. 1960, c. 46

- s. 2713n

Judges' Orders Enforcement Act, R.S.O. 1960, c. 196

- s. 3657n, 658n

Judicature Act, R.S.O. 1897, c. 51

- s. 38652n

Judicature Act, R.S.O. 1960,

- c. 197910n
- s. 5(1) as amended by Ont. 1967,
- c. 41, s. 1651n
- s. 26442n, 1062n
- s. 271062n
- s. 34270n, 272n
- s. 60617n, 766n, 923n
- s. 66239n, 655, 877n
- s. 82910n
- s. 86801n, 910n
- s. 98910n
- s. 100807n

s. 111 as enacted by Ont. 1961-62, c. 51,

- s. 3 enacting s. 111(1)(aa); by Ont. 1965, c. 51, s. 5(1)(2) enacting s. 111 (1)(f) & s. 111(4a) & by Ont. 1965, c. 51, s. 5(3) amending s. 111(5)1134n

s. 112(1) as amended by Bill 69, s. 1, 1968-69 2nd Session1401n

Juries Act, 1870, 33 & 34 Vict.,

- c. 77, s. 23856n

Juries Act 1949, 12 & 13 Geo. VI,

- c. 27, s. 1856n

Jurors Act, R.S.O. 1877, c. 48887n

Jurors Act, R.S.O. 1960, c. 199915n

- s. 35470
- s. 46773n, 778n
- s. 83856n, 900n
- s. 84857n
- s. 88857n, 900n, 901n
- s. 89857n
- s. 90857n, 900n
- s. 101916n

Jurors and Juries Act, C.S.U.C. 1859,

- c. 31887

Jury Amendment Act, N.B. 1966, c. 71

- s. 15859n

Justices and Keepers of the Peace Act, 1327 1 Edw. III, Stat. 2, c. 16 ..513n

Justices of the Peace Act, 1344 18 Edw. III, Stat. 2, c. 2 ..513n

Justices of the Peace Act, 1346 34 Edw. III, c. 1513n

Justices of the Peace Act, 1362 36 Edw. III, Stat. 1, c. 12. 514n

Justices of the Peace Act, 1389, 13 Rich. II, Stat 1, c. 7 ..514n

Justices of the Peace Act, 1439, 18 Hen. VI, c. 11514n

Justices of the Peace Act, Statutes of the Province of Canada 1842, 5 Vict.,

- c. 3

- ss. 1, 3516n

Justices of the Peace Act, R.S.O. 1960,

- c. 200

- ss. 9, 10901n

Justices of the Peace Fees Act, Statutes of Upper Canada 1827, 8 Geo. IV, c. 7 as amended by Statutes of Upper Canada 1834, 4 Will. IV, c. 17. 874n	s. 17 675
Justices of the Peace Qualification Act, R.S.O. 1877, c. 71 887n	s. 18 563n
Juvenile Courts Act, Ont. 1910, c. 96	s. 19 568n, 902n
s. 1 548n	s. 20 552
Juvenile Delinquents Act, Can. 1907-08, c. 40 547n	s. 56 as enacted by Ont. 1967, c. 43, s. 1 568n
Juvenile Delinquents Act, R.S.C. 1952, c. 160	
s. 2 550n	Labour Relations Act, R.S.O. 1960, c. 202
s. 9 551n, 552n	s. 5 as amended by Ont. 1966, c. 76, s. 2 92n
s. 13 565n	s. 14 as re-enacted by Ont. 1966, c. 76, s. 4 708n
s. 17 548n	s. 16 708n
s. 20 550n, 552	s. 18 270n, 273n
s. 22 551n	s. 28 465n, 477, 478, 479
s. 33 551n, 552	s. 34 478, 706n
s. 34 552	s. 66 270n
s. 38 548n	s. 75(2) as amended by Ont. 1966, c. 76, s. 28(1) 77n, 86n
Juvenile and Family Courts Act, Ont. 1934, c. 25 548n	s. 75(5) as amended by Ont. 1966, c. 76, s. 28(4) 70n
Juvenile and Family Courts Act, R.S.O. 1960, c. 201	s. 75(6)(7)(8) as amended by Ont. 1966, c. 76, s. 28(5) 86n
s. 1 566n, 901n	s. 77 478
s. 2 548n	s. 79(1) as amended by Ont. 1961-62, c. 68, s. 13 93n
s. 3 550n	s. 80 269n, 270n
s. 4(1) as amended by Ont. 1964, c. 51, s. 1(1) 558n, 902n	Lakes and Rivers Improvement Act, R.S.O. 1960, c. 203
s. 4(5) as amended by Ont. 1964, c. 51, s. 1(4) 558n	s. 2 340n, 350n
s. 5a as enacted by Ont. 1960-61, c. 42, s. 3 and amended by Ont. 1964, c. 51, s. 3 551n, 902n	s. 4 681n
ss. 6, 7, 8, 9, 10, 11 902n	s. 22a as enacted by Ont. 1962-63, c. 71, s. 3 419n
s. 12 797n, 805n, 902n	s. 24 270n
s. 14 as amended by Ont. 1961-62, c. 67, s. 2 & further amended by Ont. 1964, c. 51, s. 4 563n	s. 46 967, 976, 981n, 994
s. 14a as enacted by Ont. 1966, c. 75, s. 1 563n, 566n, 925n	s. 52 91n, 967, 976, 994
s. 16(1)(2) as amended by Ont. 1964, c. 51, s. 6(1)(2) 805n, 902n	s. 80 268n
s. 16a as enacted by Ont. 1961-62, c. 67, s. 4 559n, 565n	s. 87 968, 976, 982n, 987, 995
	ss. 88, 89 968, 976, 987, 995
	s. 90 968, 976, 987, 990n, 995
	s. 96 968, 976, 987, 995
	s. 100 675
	Land Titles Act, R.S.O. 1960, c. 204
	s. 8(8) as enacted by Ont. 1961-62, c. 70, s. 5(2) 673

s. 23	673, 677	Liberty of the Subject Act, Statutes of the Province of Canada 1866, 29 & 30 Vict., c. 45	771n
s. 29 as re-enacted by Ont. 1966, c. 77, s. 12	673	Lightning Rods Act, R.S.O. 1960, c. 213	
ss. 31, 46	673	s. 6	672
s. 48	673, 677	s. 15	340n
s. 162(3) as re-enacted by Ont. 1966, c. 77, s. 22	673	Line Fences Act, R.S.O. 1960, c. 216	
ss. 169, 179	673	s. 11	672
Landlord and Tenant Act, R.S.O. 1960, c. 206		Liquor Control Act, R.S.O. 1960, c. 217	507
ss. 72, 79	675	ss. 1, 9	731
Lands Clauses Consolidation Act, 1845, 8 & 9 Vict., c. 18	1073n	s. 12	270n, 980n
s. 128	1074n	s. 26(2) as amended by Ont. 1965, c. 58, s. 13(2)	270n, 731n, 733, 737, 748
Lands Tribunal Act, 1949, 12 & 13 Geo. VI, c. 42	1046n	s. 55	658n
Law Enforcement Compensation Act, Ont. 1967, c. 45	852n	s. 55a as enacted by Ont. 1965, c. 58, s. 33	658n, 672, 675
ss. 3, 4	853n	s. 79 as re-enacted by Ont. 1965, c. 58, s. 50	741n
Law Reform Act, Ont. 1868-69, c. 6		s. 87	907n
s. 11	517n	s. 100 as re-enacted by Ont. 1965, c. 58, s. 61	672
Law Reform Act, Ont. 1909, c. 28		s. 101	731
s. 21	608n	s. 106(7) as re-enacted by Ont. 1961-62, c. 72, s. 4	732n
Law Society Act, R.S.O. 1960, c. 207 ...	1160n, 1165n, 1169n, 1170n, 1174n, 1195, 1218B	s. 110(1) as re-enacted by Ont. 1965, c. 58, s. 68	425n, 426
s. 5	1212	s. 111	731n
s. 24	1215	ss. 112-116	741n
s. 42	1168n	s. 118	899n
s. 43	1215	s. 122	916n
s. 44	1223	s. 140 as amended by Ont. 1965, c. 58, s. 77	672, 675
s. 50	1215	s. 140(1)	658n, 675, 787, 788n
s. 53	478	s. 141	675
s. 54	1215	Liquor Licence Act, R.S.O. 1960, c. 218	440, 507, 733n, 787n
Law Society of Upper Canada Act, C.S.U.C. 1859, c. 33	878n	s. 1	733n
Legal Aid Act, Ont. 1966, c. 80	660n, 1511n	s. 16 as amended by Ont. 1965, c. 59, s. 3	439n, 478
Legislative Assembly Act, R.S.O. 1960, c. 208		s. 17(1) as amended by Ont. 1965, c. 59, s. 4(1)	79n, 421n
s. 45	478	s. 17(2) as amended by Ont. 1965, c. 59, s. 4(2)	421n
s. 57	1468n	s. 20 as amended by Ont. 1961-62, c. 73, s. 1	270n, 674, 677
Libel and Slander Act, R.S.O. 1960, c. 211			
s. 13	673		

s. 28	79n	Magistrates' Court Act, 1952, 15 & 16	
s. 43a as enacted by Ont. 1961-62, c. 73,		Geo. VI & 1 Eliz. II, c. 55	
s. 6	676	s. 4	757n
s. 43c as enacted by Ont. 1961-62, c. 73,		s. 10	616n
s. 6	672	s. 38	748n
s. 53	734n	Magistrates' Jurisdiction Act, Ont. 1929,	
ss. 59, 60	733n	c. 36	548n
s. 66	788n, 916n	Married Women's Property Act, R.S.O.	
s. 85	733n	1960, c. 229	
s. 87	916n	s. 12	676
Live Stock and Live Stock Products Act,		Matrimonial Causes Act, R.S.O. 1960,	
R.S.O. 1960, c. 219		c. 232	
s. 4	424n	ss. 39, 40	676
Loan and Trust Corporations Act,		Meat Inspection Act, Ont. 1962-63,	
R.S.O. 1960, c. 222		c. 78	415n, 1099n
s. 102	273n, 274	Mechanics' Lien Act, R.S.O. 1960, c. 233	
s. 115	470	s. 39	676, 677
s. 126	676	s. 40	656n, 674, 676
Local Courts Act, R.S.O. 1877, c. 42		Medical Act, 1956, 4 & 5 Eliz. II,	
s. 23	886n	c. 76	1165n
Local Crown Attorneys Act, R.S.O. 1877,		s. 24	1180n, 1187n
c. 78	887n	s. 26	1180n
Local Improvement Act, R.S.O. 1960,		s. 37	1188n
c. 223		Medical Act, R.S.O. 1960,	
s. 36	672	c. 234 ..	1160n, 1165n, 1169n, 1170n,
ss. 51, 60	676	1206, 1208, 1218B	
Logging Tax Act, R.S.O. 1960, c. 224		s. 3	1212
s. 14	470	ss. 9, 14	1215
s. 21	674, 676	s. 20	73n
Magistrates Act, R.S.O. 1960,		ss. 23, 24, 30	1215
c. 226	902n	s. 33 as amended by Ont. 1962-63, c. 80,	
s. 2 as amended by Ont. 1964, c. 57,		s. 1	1223
s. 2	903n	s. 34 as amended by Ont. 1962-63, c. 80,	
s. 3	470, 527n, 541n, 542	s. 1	1188n
s. 4 as re-enacted by Ont. 1961-62, c. 76,		s. 35	676
s. 1	528n	s. 38(1) as re-enacted by Ont. 1962-63,	
s. 10	542n, 543	c. 8, s. 2 and further amended by	
ss. 12, 13, 14, 15, 18	903n	Ont. 1966, c. 85, s. 4	1199n
s. 19	904n	s. 39(1) as re-enacted by Ont. 1966,	
s. 19a as enacted by Ont. 1964, c. 57,		c. 85, s. 5(1)	1196n
s. 4	543n	s. 40(3) as amended by Ont. 1962-63,	
s. 20	803n	c. 80, s. 2	89n
Magistrates' Accounting Act, Statutes of		s. 40a as enacted by Ont. 1966, c. 85,	
Upper Canada 1827, 8 Geo. IV.,		s. 6	676
c. 4	875n	s. 41 as re-enacted by Ont. 1966, c. 85,	
		s. 7	674, 676, 1196n

s. 43	1207n	Milk Control Act, R.S.O. 1937, c. 76	
s. 61	916n	s. 6	144n
ss. 62, 63	1215	Milk Industry Act, Ont. 1954, c. 52	
Mental Health Act, Ont. 1967,		s. 12	1099n, 1100n
c. 51	1235n, 1239n, 1384	Minimum Wage Act, R.S.O. 1960, c. 240	
s. 1	1232n	s. 3 as amended by Ont. 1962-63, c. 83,	
s. 6	1232n, 1238n	s. 2	358n
s. 7	1232n	s. 4	358n
s. 8	1232n, 1234n	s. 7a as enacted by Ont. 1962-63, c. 83,	
s. 10	1233n, 1252	s. 4	347n, 471
s. 13	1233n, 1253	Mining Act, R.S.O. 1960, c. 241	
s. 14	1236n	s. 98	676
ss. 15, 16	1237n	s. 128	471
s. 17	1234n, 1253	s. 155	676
s. 27	1234n	s. 157	270n
s. 29	1235n	s. 158	275n
s. 32	1239n	s. 169	493n
s. 44	1252n, 1254	s. 170 as enacted by Ont. 1961-62, c. 81,	
s. 48	1240n, 1253	s. 1	360n
s. 50	1248n	s. 619 as enacted by Ont. 1961-62, c. 81,	
s. 51	1244n	s. 1	945n
s. 55	1249n, 1254	s. 629	465n, 479
s. 58	1250n, 1254	s. 647	346n, 349n
s. 61	1238n	Mining Tax Act, R.S.O. 1960, c. 242	
Mental Hospitals Act, R.S.O. 1960,		ss. 10, 28	676
c. 236	1231n	Minors' Protection Act, R.S.O. 1960,	
s. 15	270n	c. 243	551, 552
s. 18	479	Mortgage Brokers Registration Act,	
s. 38 as amended by Ont. 1962-63, c. 81,		R.S.O. 1960, c. 244	
s. 6	72n, 1237n	s. 5 as re-enacted by Ont. 1964, c. 63,	
s. 80	1239n	s. 3	1125n
s. 95	1240n	s. 6 as re-enacted by Ont. 1964, c. 63,	
s. 97	1248n	s. 3	1105n, 1125n
s. 102	1249n	ss. 6a, 6c as enacted by Ont. 1964, c. 63,	
Mental Incompetency Act, R.S.O. 1960,		s. 3	1125n
c. 237		s. 8 as re-enacted by Ont. 1964, c. 63,	
ss. 5, 9	676	s. 5	420n, 428n
Mental Incompetency Amendment Act,		s. 8b as enacted by Ont. 1964, c. 63,	
Ont. 1963-64, c. 60	1251n	s. 5	459n
Metropolitan Separate School Board		s. 11a as enacted by Ont. 1964, c. 63,	
Act, Ont. 1953, c. 119		s. 7	676
ss. 1, 3, 8, 9, 10	1035n	Mortgages Act, R.S.O. 1960, c. 245	
Milk Act, Ont. 1965, c. 72	1099n	s. 10	676
s. 4	471	Mortmain and Charitable Uses Act,	
s. 5	424n	R.S.O. 1960, c. 246	
ss. 7, 8	344n	s. 14	676
ss. 20, 22	916n		

Mothers' and Dependent Children's

Allowances Act, R.S.O. 1960,
c. 2471137n

Motor Vehicle Accident Claims Act,
Ont. 1961-62, c. 84850n

s. 6674

s. 26676

Motor Vehicle Fuel Tax Act, R.S.O.
1960, c. 248

s. 10395n

s. 19 as amended by Ont. 1964, c. 67,

s. 2460n

Motor Vehicle Fuel Tax Act, Ont. 1965,
c. 76

s. 5471

Motor Vehicles Act, R.S.Q. 1941, c. 142

s. 58 as amended by Que. 1959-60,

c. 67, s. 47731n

Municipal Act, Ont. 1913, c. 43

s. 339705n

s. 354693n, 700n

Municipal Act, R.S.O. 1937, c. 266

s. 2711103n

Municipal Act, R.S.O. 1960,

c. 249869n, 904n, 1094n

s. 55912n

s. 58672

s. 128816n

s. 170674

s. 230471

s. 247656n, 658n, 674, 1107,

1108, 1116n, 1119n, 1125n,

1128n, 1131n, 1132n

s. 2481097n, 1107n

s. 320472

s. 333968, 975n, 984n, 995, 1077n

s. 3341077n

s. 338968, 975n, 976, 995

s. 346676

s. 347676, 705n, 1032n, 1034n,

1039, 1066-1071

s. 348705n, 1032n, 1034n, 1035n,

1040n, 1070, 1071

ss. 352, 353, 355, 356, 357, 360905n

ss. 362, 363, 369906n

s. 372 as amended by Ont. 1966, c. 93,

s. 21905n

ss. 374, 375906n

s. 377968, 975n, 976, 995, 1097n

s. 379968, 975n, 995, 1098n, 1107

s. 385(2) as amended by Ont. 1961-62,

c. 86, s. 40905n

s. 3861098n

s. 3951097n, 1101n, 1102n,

1107n, 1108n

s. 3961097n

s. 3991098n, 1107n, 1108n

s. 400 para. 21097n

s. 400 para 4 as amended by Ont.

1961-62, c. 86, s. 441098n

s. 4011097n, 1099n, 1107n

s. 431676

s. 482 as amended by Ont. 1961-62,

c. 86, s. 55912n

s. 483912n, 917n

Municipal Arbitrations Act, R.S.O.

1937, c. 280

s. 1705n

Municipal Arbitrations Act, R.S.O.

1950, c. 244

s. 121037n

Municipal Arbitrations Act, R.S.O.

1960, c. 2501032n, 1049, 1060n

s. 1 as amended by Ont. 1965, c. 78,

s. 1479, 705n, 1034n,

1052n, 1066-1071

s. 31066

s. 41061n, 1068

s. 51061n, 1068, 1070

s. 61068, 1070

s. 7676, 1070

s. 121034n, 1037n, 1039n, 1069

s.15(1) as amended by Ont. 1965, c. 78,

s. 41034n, 1040n

s. 15(2)1039n, 1040n

Municipal Franchises Act, R.S.O. 1960,

c. 255

s. 10676

Municipal Institutions Act, C.S.U.C.

1859, c. 54879n

s. 381880n

Municipal Institutions Act, R.S.O. 1877, c. 174 ss. 396, 398, 429, 430, 431, 432, 440, 442, 443, 445885n	National Transportation Act, Can. 1966-67, c. 691550, 1552, 1583
Municipal Subsidy Act, R.S.O. 1937, c. 273890n	Niagara Parks Act, R.S.O. 1960, c. 262 s. 6969, 977, 984n, 988, 995 s. 19916n
Municipal Unconditional Grants Act, Ont. 1953, c. 72895n, 891	North Dakota Century Code, c. 12-57 (1917 repealed 1965)837n
Municipal Unconditional Grants Act, R.S.O. 1960, c. 259.891n, 892n, 895n s. 8896n s. 8a as enacted by Ont. 1960-61, c. 60, s. 1896n	Nurses Act, Ont. 1961-62, c. 901160n, 1195, 1206n, 1218B, 1224 s. 31212 s. 61164n, 1215 s. 11674
Municipal Unconditional Grants Amendment Act, Ont. 1957, c. 80895n s. 1891n	Old Age Assistance Act, R.S.O. 1960, c. 2671137n
Municipal Unconditional Grants Amendment Act, Ont. 1964, c. 69895n s. 2891n	Old Age Pensions Act, R.S.C. 1952, c. 1991145n
Municipality of Metropolitan Toronto Act, 1953, c. 73 s. 41342n	Omnibus Crime Control and Safe Streets Act of 1968 (U.S.) Public Law 90-351, 82 Stat. 197, Title III s. 8011582-83
Municipality of Metropolitan Toronto Act, R.S.O. 1960, c. 260 s. 93968, 976, 995 s. 98676 s. 116968, 976 s. 145a as enacted by Ont. 1966, c. 96, s. 12968, 977, 995 s. 164a as enacted by Ont. 1966, c. 96, s. 19907n s. 173906n s. 177 as amended by Ont. 1961-62, c. 88, s. 12906n ss. 179, 180, 182906n ss. 189, 190, 192, 203, 206, 207907n s. 212479 s. 215917n s. 225(1) as amended by Ont. 1966, c. 96, s. 36(1)917n ss. 261, 262472	Ontario Energy Board Act, R.S.O. 1960, c. 271 ss. 14, 191044n
	Ontario Energy Board Act, Ont. 1964, c. 74 s. 14479 s. 21676, 969, 977, 981n, 988, 995, 1031n, 1043n, 1048n, 1063n s. 31676, 677 s. 32676 s. 34349n s. 40969, 981n, 988, 991n, 995 s. 41676, 1031n, 1043n, 1048n, 1049, 1063n s. 51422n
	Ontario Food Council Act, Ont. 1962-63, c. 94 s. 6472
	Ontario Highway Transport Board Act, R.S.O. 1960, c. 273404n s. 9405n, 479 s. 19676, 677 s. 21676
Narcotic Control Act, Can. 1960-61, c. 35 s. 10426n	

Ontario Human Rights Code, Ont.	
1961-62, c. 93	11n, 1556n, 1598-99
s. 13	479
Ontario Mental Health Foundation Act, Ont. 1960-61, c. 67	1231n
Ontario Municipal Board Act, R.S.O. 1960, c. 274	
s. 17	78n, 1040n
s. 33	437n, 479
s. 37	437n, 479, 1022n
s. 52	479
s. 89	1065n
s. 90	1022n
s. 93	676, 677, 1060n
s. 94	1069
s. 95	271n, 676, 1063n, 1069
s. 96	1068, 1069
s. 98	1038n
s. 99	1069
s. 362	1036n
Ontario Northland Transportation Commission Act, R.S.O. 1960, c. 276	
ss. 24, 29	969, 977, 995
Ontario Stenographic Reporters' Act, Ont. 1891, c. 30	799n
Ontario Telephone Development Corporation Act, R.S.O. 1960, c. 280	
s. 4	969, 977, 985n, 988, 996
s. 6	969, 977, 985n, 996
Ontario Water Resources Commission Act, R.S.O. 1960, c. 281	
s. 19	970, 977, 996
s. 26	977
s. 32	970, 996
s. 47	473
Operating Engineers Act, 1965, c. 92	
s. 24	473
Ophthalmic Dispensers Act, Ont. 1960-61, c. 72	1160n, 1206n, 1218B, 1224
s. 2	1212
s. 16	672
s. 22	1191n, 1216
Optometry Act, 1961-62, c. 101	1160n, 1169n, 1195, 1206n, 1218B, 1224

s. 4	1212
s. 7	1169
s. 11	473, 657n, 674
s. 16	1170n, 1216
Parents' Maintenance Act, R.S.O. 1950, c. 284	551, 552
Parliamentary Commissioner Act (N.Z.), Statutes of New Zealand 1962, No. 10	1353
ss. 5, 11(1), (2), (3), (5), (5)(a)	1354n
s. 11(7)	1373n
ss. 13, 14	1355n
ss. 15, 16, 16(6), 18	1356n
ss. 19(3)(g), 21	1357n
Parliamentary Commissioner Act (U.K.), 15 Eliz. II, c. 13	1374
s. 1(3)	1374n
s. 5(1)	1375n
ss. 5(2), 6(3), 7(1), 8	1376n
ss. 9, 10(2), (3), (4), 11, 12(3)	1376
Partition Act, R.S.O. 1960, c. 287	
s. 9	676
Pension Benefits Act, Ont. 1965, c. 22	
ss. 23, 24	676
Pharmacy Act, R.S.O. 1960, c. 295	1160n, 1195, 1206, 1218C
s. 4	1212
s. 6	658n
s. 24	1216
s. 29(1) as amended by Ont. 1966, c. 115, s. 6	1225
s. 29(5) as amended by Ont. 1966, c. 115, s. 6	658n
s. 29(7) as amended by Ont. 1966, c. 115, s. 6	1197n
s. 29a(1) as enacted by Ont. 1965, c. 97, s. 1	429n
s. 51	473, 676, 1191n, 1223, 1225
s. 57	1207n, 1208n
s. 61	917n
Physicians and Surgeons Act, R.S.Q. 1964, c. 249	
s. 60	821n

Planning Act, R.S.O. 1960, c. 296	s. 96	474
s. 20970, 975n, 977, 982n, 989, 996	s. 97	917n
s. 23	Power Control Act, R.S.O. 1960, c. 302	
s. 28(4)	s. 5	970, 977, 996
s. 28(7) as amended by Ont. 1962-63,	Prepaid Hospital and Medical Services	
c. 105, s. 8(1)	Act, R.S.O. 1960, c. 304	
Plant Diseases Act, R.S.O. 1960, c. 297	s. 11	676
s. 10	Prevention of Cruelty to, and Better	
Police Act, Statutes of Upper Canada	Protection of, Children Act, Ont.	
1817, 57 Geo. III, c. 2	1893, c. 45	547n
Police Act, R.S.O. 1960, c. 298	Private Hospitals Act, R.S.O. 1960,	
s. 2(1a) as enacted by Ont. 1965, c. 99,	c. 305	415n, 1231n
s. 1 and amended by Ont. 1967, c. 76,	s. 9a as enacted by Ont. 1962-63, c. 107,	
s. 1	s. 5	674
s. 2(2) as amended by Ont. 1964, c. 92,	Private Investigators and Security	
s. 2	Guards Act, Ont. 1965, c. 102	
s. 3	ss. 4, 8	22n
s. 3a as enacted by Ont. 1964, c. 92,	s. 21	658n, 676
s. 3	Private Sanitaria Act, R.S.O. 1960,	
s. 7	c. 307	917n, 1231n
s. 12	ss. 3, 6	918n
s. 37 as amended by Ont. 1961-62,	s. 36	480, 946n
c. 105, s. 5	s. 45	428n
s. 38 as amended by Ont. 1966, c. 118,	s. 48	918n
s. 10	Probation Act, R.S.O. 1960, c. 308	
s. 40	s. 4	564n
s. 48	Proceedings Against the Crown Act,	
s. 48a as enacted by Ont. 1964, c. 92,	Ont. 1962-63, c. 109	40n
s. 17	Professional Engineers Act, R.S.O. 1960,	
s. 52	c. 309	433n, 658n, 1160n, 1170n,
s. 53 as amended by Ont. 1964, c. 92,	1171n, 1195, 1206n, 1216, 1218C	
s. 19	s. 3	918n
Police Magistrates Act, R.S.O. 1877,	ss. 4, 5	1169n
c. 72	s. 8	1212
Pounds Act, R.S.O. 1960, c. 299	s. 26	674
s. 24	s. 28	73n, 474, 676, 1189n, 1225
Power Commission Act, R.S.O. 1960,	Protection of Travellers Act, Statutes of	
c. 300	Upper Canada 1812, 52 Geo. III,	
s. 24	c. 4	871n
s. 33	Protection of Travellers Act, Statutes of	
s. 34	Upper Canada 1816, 56 Geo. III,	
s. 38	c. 11	870n, 873n
s. 42	Provincial Auctioneers Act, R.S.O. 1960,	
s. 46	c. 312	96n, 100
s. 66	s. 4	73n, 94n
s. 84		

Provincial Land Tax Act, Ont. 1961-62, c. 11	s. 118918n
s. 16672	s. 133271n
s. 18271n	Public Hospitals Act, R.S.O. 1960, c. 322
Psychiatric Hospital Act, R.S.O. 1960, c. 3151231n	s. 7971, 977, 984n, 996
s. 23 as re-enacted by Ont. 1966, c. 123, s. 21237n	ss. 65-701231n
Psychologists Registration Act, R.S.O. 1960, c. 3161160n, 1195, 1206n, 1218C, 1225	Public Inquiries Act, R.S.A. 1955, c. 258435n
s. 21212	Public Inquiries Act, R.S.O. 1960, c. 323403, 434, 435, 465, 466
s. 51217	s. 1385n, 402n, 427n, 432
s. 6 as amended by Ont. 1965, c. 105, s. 11164n	s. 2385n, 432, 433, 438n, 480
s. 7 as amended by Ont. 1962-63, c. 112, s. 11164n	s. 5385n, 447n, 676, 677
s. 9674	Public Lands Act, R.S.O. 1960, c. 324 s. 24962n
Public Accountancy Act, R.S.O. 1950, c. 302145n	Public Libraries Act, R.S.O. 1960, c. 3251071n
s. 19146n	s. 311075n
Public Accountancy Act, R.S.O. 1960, c. 3171108n, 1160n, 1170n, 1195, 1206n, 1218C	Public Libraries Act, Ont. 1966, c. 123 s. 16971, 977, 996, 1075n
s. 31212	s. 541074n
s. 15(1) as re-enacted by Ont. 1961-62, c. 113, s. 61164n	Public Officers' Fees Act, R.S.O. 1960, c. 327
s. 15(3)1217	ss. 4, 5, 6910n
s. 1974n, 1098n, 1226	s. 7 as re-enacted by Ont. 1962-63, c. 116, s. 1629n, 910n
s. 22656n, 674	s. 9910n
s. 321217	Public Parks Act, R.S.O. 1960, c. 329
Public Authorities Protection Act, R.S.O. 1960, c. 318	s. 15971, 978, 983n, 996
s. 4672, 674	s. 17971, 978, 997
Public Commercial Vehicles Act, R.S.O. 1960, c. 319	Public Schools Act, R.S.O. 1960, c. 330 s. 58673
s. 484n, 99n, 1109n	Public Service Act, R.S.N.S. 1954, c. 240953n
Public Departments Act, R.S.P.E.I. 1951, c. 128	s. 4954n
s. 4952n	Public Service Act, Ont. 1961-62, c. 121
Public Health Act, R.S.O. 1960, c. 321	s. 1(da) as enacted by Ont. 1962-63, c. 118, s. 1981n
s. 5474	s. 10 as amended by Ont. 1966, c. 130, s. 1528n, 558n
s. 32672	s. 18474
s. 8593n, 415n	s. 20475
s. 105 as amended by Ont. 1966, c. 125, s. 20207n	Public Service Superannuation Act, R.S.O. 1960, c. 332
	s. 24528n

Public Trustee Act, R.S.O. 1960,	
c. 334	1239n
s. 1	1248n
s. 5	1247n
s. 6	475
s. 8	1244n
s. 14	1243n
Public Utilities Act, R.S.O. 1960, c. 335	
ss. 2, 4, 20, 41	971, 975n, 978, 997
s. 58	972, 978, 988, 997
s. 62	972, 975n, 978, 983n, 989, 997
s. 64	972, 978, 997
Public Works Act, R.S.O. 1960, c. 338	
s. 5	428n
s. 13	98n, 972, 978, 982n, 997, 1000n
s. 15	972, 978, 997
s. 25	1077n
s. 31	676
s. 48	973, 978, 981n, 997
Quieting Titles Act, R.S.O. 1960, c. 340	
s. 33	674
s. 34	676
Race Tracks Tax Act, R.S.O. 1960, c. 341	
s. 6	475
s. 10	460n
Radiological Technicians Act, Ont.	
1962-63, c. 122	1160n, 1204n, 1206n, 1218C
s. 2	1212
s. 10	475, 1226
s. 11	673
s. 13	1207n, 1208n
s. 14	1217
Railway Act, R.S.C. 1952, c. 234 ..	1045n
Railway Fire Charge Act, R.S.O. 1960,	
c. 343	
s. 5	269n, 271n
Real Estate and Business Brokers Act,	
R.S.O. 1960, c. 344	
s. 6(2) as enacted by Ont. 1964, c. 99,	
s. 5	1125n
s. 7 as enacted by Ont. 1964, c. 99,	
s. 5	1105n, 1125n
s. 8(2) as enacted by Ont. 1964, c. 99,	
s. 5	1125n
s. 24(3) as amended by Ont. 1964, c. 99,	
s. 8(3)	428n
s. 24(4) as amended by Ont. 1964, c. 99,	
s. 8(4)	420n
s. 26 as re-enacted by Ont. 1964, c. 99,	
s. 10	459n
ss. 30, 31 as amended by Ont. 1964,	
c. 99, s. 12	1128n
s. 32 as amended by Ont. 1964, c. 99,	
s. 12	676, 1128n
ss. 33, 34 as amended by Ont. 1964,	
c. 99, s. 12	1128n
s. 54h as enacted by Ont. 1962-63,	
c. 123, s. 24	676
s. 57	271n
Reciprocal Enforcement of Maintenance	
Orders Act, R.S.O. 1960,	
c. 346	551, 552
Recovery of Small Debts Act, Statutes of	
Upper Canada 1792, 32 Geo. III,	
c. 6	621n
Registry Act, R.S.O. 1960, c. 348	
s. 91(3)	676
s. 94a(9) as enacted by Ont. 1964,	
c. 102, s. 27	676
s. 104	674
s. 122	465n, 480
Regulations Act, Man. 1960, c. 62 ..	374n
Regulations Act, R.S.O. 1960, c. 349	
ss. 1, 2	364n
s. 5	364n, 365n
Reporters in the Superior Courts Act,	
C.S.U.C. 1859, c. 37	
s. 1	877n
Research Foundation Act, Ont. 1944,	
c. 53	
s. 11(c)	973, 988, 997
Retail Sales Tax Act, Ont. 1960-61,	
c. 91	1099n
s. 12 as amended by Ont. 1962-63,	
c. 61, s. 5	460n
s. 18	674
s. 22	676
s. 24	475
s. 39	352n

- Revised Model State Administrative Procedure Act, U.S. . . . 150, 151, 152, 158, 160, 165, 292n, 301n
 s. 1 163n, 175n
 ss. 2, 4, 5 159n
 s. 8 181n
 s. 9 161n, 163n, 164n, 171n, 172n
 s. 10 167n, 168n, 170n
 s. 11 175n
 s. 12 174n
 s. 13 171n
 s. 14 176n, 1122n
 s. 15 173n, 299n, 300n
- Royal Commissions Act, Australia 1925-1934
 s. 7 449n
- Ryerson Polytechnical Institute Act, Ont. 1962-63, c. 128
 s. 7 973, 978, 997
- St. Clair Parkway Commission Act, Ont. 1966, c. 146
 s. 4 974, 979, 989, 998
- St. Lawrence Parks Commission Act, R.S.O. 1960, c. 279 as renamed by Ont. 1964, c. 84, s. 4
 s. 7 974, 979, 985n, 989, 998
- Sanatoria for Consumptives Act, R.S.O. 1960, c. 359
 s. 22 973, 979, 988, 989, 998
 s. 24 1074n
- Saskatchewan Bill of Rights Act, R.S.S. 1965, c. 378 1606, 1650-52
- Schools Administration Act, R.S.O. 1960, c. 361 552
 s. 15(5) as amended by Ont. 1961-62, c. 130, s. 2(2) 550n
 s. 18 676
 s. 20 72n
 s. 29 476
 s. 57 74n
 s. 65 973, 979, 998, 1036n
 s. 69 676
 s. 83 268n
 s. 84 480
- Secondary Schools and Boards of Education Act, R.S.O. 1960, c. 362
 s. 6 as amended by Ont. 1961-62, c. 131, s. 1 673
 s. 7 974, 998
- Securities Act, R.S.O. 1960, c. 363 (repealed by Ont. 1966, c. 142, s. 147)
 s. 21(3)(a) as amended by Ont. 1966, c. 142, s. 21(4) 409n, 439n
 s. 70 271n
- Securities Act, Ont. 1966, c. 142
 s. 5 1124n, 1125n
 ss. 7, 8 1105n, 1124n
 s. 21 420n, 465n, 480
 s. 24 459n
 s. 29 658n, 677, 1123n
 ss. 89, 112, 114 677
- Security Transfer Tax Act, R.S.O. 1960, c. 364
 s. 11 476
- Separate Schools Act, R.S.O. 1960, c. 368
 s. 49 as re-enacted by Ont. 1962-63, c. 132, s. 8 and amended by Ont. 1964, c. 108, s. 7 673
 s. 73 918n
- Sheriffs Act, Statutes of Upper Canada 1806, 46 Geo. III, c. 1 . . . 871n, 873n
- Sheriffs Act, R.S.O. 1960, c. 371 . . . 907n
 s. 1 as amended by Ont. 1965, c. 124, s. 1 908n
 s. 15 908n
- Shorthand Reporters Act, R.S.N.B. 1952, c. 209 812n
- Small Debts Act, Statutes of Upper Canada 1792, 32 Geo. III, c. 6 . . 606n
- Small Debts Act, Statutes of Upper Canada 1833, 3 Will. IV, c. 1 873n, 874n
- Small Debts Act, Statutes of the Province of Canada 1841, 4 Vict., c. 3 . . 606n
- Snow Roads and Fences Act, R.S.O. 1960, c. 376
 s. 11 673

- Solicitors Act, R.S.O. 1960,
 c. 3781160n, 1206n
 s. 31176n
 s. 81217
- Special Constables Act, R.S.O. 1877,
 c. 83890n
- Special War Revenue Act, R.S.C. 1927,
 c. 179
 s. 98 as enacted by Can. 1932-33, c. 50,
 s. 20258n
- Statistics Act, R.S.C. 1952, c. 257
 ss. 6, 15461n
- Statistics Act, Ont. 1962-63, c. 133 ..401n
 s. 4461n
- Statute Labour Act, R.S.O. 1960, c. 382
 s. 8918n
- Statute of Westminster, 22-23 George V,
 c. 41542
- Steam Threshing Engines Act, R.S.O.
 1960, c. 384
 s. 3918n
- Stock Yards Act, R.S.O. 1960, c. 385
 s. 5271n, 974, 979, 989, 998
- Succession Duty Act, R.S.O. 1960,
 c. 386440
 s. 27272n, 391n, 395n, 396, 398n
 s. 28272n, 396, 481
 s. 29395n, 396
 s. 30439n
 s. 34674, 677
- Summary Convictions Act, R.S.O. 1960,
 c. 387655, 753
 s. 3 as amended by Ont. 1964, c. 113,
 s. 1505n, 507n, 533n, 783n,
 869n, 901n, 1236n
 s. 5673, 677
 s. 6643n
 s. 7725n, 740n
 s. 9833n
 s. 14408n, 414n, 416n, 419
 s. 15 as amended by Ont. 1966, c. 149,
 s. 2745n, 748n
 s. 17672, 833n, 834n
 s. 19791n
- Summary Jurisdiction Act, (Northern
 Ireland) 1953, c. 3
 s. 42759n
- Summary Punishment Act, Statutes of
 Upper Canada 1834, 4 Will. IV,
 c. 4873n
- Superior Courts Act, Statutes of Upper
 Canada 1794, 34 Geo. III, c. 2. .869n
- Superior Courts of Law Act, C.S.U.C.
 1859, c. 10
 s. 29876n
- Superior Courts of Law Act, R.S.O.
 1877, c. 39
 ss. 45, 46886n
- Supply Act, Ont. 1966, c. 15143n
- Supreme Court Act, R.S.C. 1952,
 c. 25935n
 s. 37504n
 s. 41508n
- Surrogate Courts Act, R.S.O. 1877, c. 46
 ss. 68, 69, 70, 71886n
- Surrogate Courts Act, R.S.O. 1960,
 c. 388655, 910n
 ss. 2, 8911n
 s. 8(4) as enacted by Ont. 1967, c. 97,
 s. 1694n, 722n, 909n
 s. 12 as amended by Ont. 1965, c. 129,
 s. 2911n
 s. 21610n, 652n
 s. 22610n
 s. 29857n
 ss. 74, 89911n
- Surveyors Act, R.S.O. 1960,
 c. 3891160n, 1170n, 1179n,
 1195, 1206n, 1218C
 s. 61212
 s. 241180
 s. 36656n, 674, 677, 1189n, 1226
 s. 38918n
- Telephone Act, R.S.O. 1960, c. 394
 s. 6476
 ss. 17, 19677
 s. 28974, 975n, 979
 s. 54974, 975n, 979, 989, 998

- Territorial Division Act, Statutes of the Province of Canada 1849, 12 Vict., c. 78
 s. 3606n
 Territorial Division Act, C.S.U.C. 1859, c. 3879n
 Territorial Division Act, R.S.O. 1877, c. 5885n
 Territorial Division Act, R.S.O. 1960, c. 395
 s. 1 as amended by Ont. 1964, c. 116, s. 1904n, 910n
 s. 5904n
 Threshing Machines Act, R.S.O. 1960, c. 397918n
 s. 3919n
 Tobacco Tax Act, Ont. 1965, c. 130
 s. 9476
 Town and Country Planning Act, 1947, 10 & 11 Geo. VI, c. 51
 s. 10187n
 Town and Country Planning Act, 1962, 10 & 11 Eliz. II, c. 38
 s. 781074n
 Training Schools Act, Ont. 1965, c. 132551, 552
 s. 8908n
 s. 13673, 674
 s. 16908n
 s. 17673
 s. 18677, 908n
 Trench Excavators' Protection Act, R.S.O. 1960, c. 407
 s. 25919n
 Tribunals and Inquiries Act 1958, 6 & 7 Eliz. II, c. 66113n, 189n, 200n
 s. 1201n
 s. 7a1005n, 1006n
 s. 8201n, 279n
 s. 12201n, 202n, 1005n, 1006n
 Tribunals and Inquiries Act, 1966, c. 431005n
 Tribunals of Inquiry (Evidence) Act 1921, 11 & 12 Geo. V, c. 7
 s. 1445n
- Unconscionable Transactions Relief Act, R.S.O. 1960, c. 410
 s. 4677
 Unemployment Insurance Act, Can. 1955, c. 501538
 Union Act, 1840, 3 & 4 Vict., c. 35874n
 s. 3883n
 University Expropriation Powers Act, Ont. 1965, c. 135
 s. 2974, 979, 998
 Unjust Conviction and Imprisonment Act, 28 U.S.C. (1940)839n
 s. 1495837n, 839n
 s. 2513837n, 839n, 840n
 Used Car Dealers Act, Ont. 1964, c. 121
 s. 41125n
 s. 51105n, 1125n
 ss. 6, 81125n
 s. 11(2) as amended by Ont. 1967, c. 104, s. 5(1)806n
 s. 11(4)428n
 s. 11(5)420n
 s. 13459n
 s. 17577
 s. 18a as enacted by Ont. 1965, c. 139, s. 1677
- Vendors and Purchasers Act, R.S.O. 1960, c. 414
 s. 3 as amended by Ont. 1960-61, c. 101, s. 1677
 Veterinarians Act, R.S.O. 1960, c. 4161160n, 1170n, 1193n, 1206n, 1218C
 s. 81217
 s. 14476, 677, 1189n, 1227
 s. 181207n, 1208n
 Voters' List Act, R.S.O. 1960, c. 420
 s. 14673
 s. 39677
- War Measures Act, R.S.C. 1927, c. 206
 s. 3259n

Water Powers Regulation Act, R.S.O.	
1960, c. 426	435n
s. 11	476
s. 12	434n
s. 13	435n, 476
Weed Control Act, R.S.O. 1960, c. 427	
s. 9	419n
Welfare and Institutions Code, 1965	
(Cal.), c. 1549	
s. 11211	846n
Wilderness Areas Act, R.S.O. 1960,	
c. 432	
s. 4	979, 983n, 998, 1000n

Wisconsin Statutes, Title 27 (1957),	
s. 285.05 (1913)	837n
Workmen's Compensation Act, R.S.O.	
1960, c. 437	124n, 348
s. 65	441n, 465n, 481, 946n
s. 66	78n
s. 72	270n, 271n
s. 75	441n, 481, 946n
s. 86	347n
s. 94	416n, 477
s. 120	919n
s. 122 as amended by Ont. 1965, c. 142,	
s. 7	849n

Vol. 1, pp. 1-498: Vol. 2, pp. 499-956: Vol. 3, pp. 957-1332: Vol. 4, pp. 1333-1733

INDEX

- Act of Settlement:46
- Adjudicative Facts:156-57
- Administration of Justice: *see also Courts of Justice*
 - financial responsibility for:
 - Administration of Justice Expenses Act893-97
 - finances:
 - imposed for breaches of federal laws914
 - imposed for breaches of provincial laws913-14
 - to be paid to, or shared by, other than the province915-19
 - history of867-91
 - municipalities, funds received by911-13
 - obligations:
 - of municipalities897-908
 - of the province908-11
 - recommendations920-28
- Administrative Courts, French:
 -1410-1473
 - see also Conseil d'Etat; Tribunal Administratif*
 - administrative police1449-50
 - alternate remedies1428
 - autonomy of1415
 - capacité (interest to institute an action)1454
 - commissaire du gouvernement ...1457
 - conclusions1462-73
 - Constitution of 1958 ...1432-33, 1444
 - constitutional barrier against adoption in Ontario1465-66
 - contentieux d'annulation1426-42
 - contentieux de pleine juridiction
 -1424-25
 - contentieux des droits1424-25
 - control of reasons for administrative acts1445-48
 - control over Executive1416-17
 - counsel1459-60
- Administrative Courts, French:—*con.*
 - la décision préalable (preliminary decision)1452-54
 - time limits1453-54
 - delay1462-63
 - determining v. non-determining facts
 -1448
 - emergency orders (référé)1455-56
 - evidence1456
 - exactitude de la matérialité des faits (material correctness of facts)
 -1449
 - general principles applied in exercise of jurisdiction1443-44
 - history1415-17
 - interim suspension of decision ...1455
 - interlocutory measures1455-56
 - investigatory powers greater than in Ontario1471
 - judgment1457-59
 - co-operation of Administration required1459
 - difficulties of enforcing1458-59
 - effect on Administration ...1458-59
 - third persons affected1458-59
 - time limit1459
 - judicial powers1424-42
 - juridical "qualification" applied by Administration1448-49
 - legal aid1460
 - manque de base légale1445-46
 - material required on application to
 -1454-55
 - motifs de droit1445-47
 - motifs de fait1445, 1447-48
 - motifs de fond1458
 - policy decisions1449-50
 - powers of judge1426
 - powers re legislative changes affecting government-citizen contracts
 -1471-72
 - procedure1452-61
 - rapporteur1456-57

Vol. 1, pp. 1-498: Vol. 2, pp. 499-956: Vol. 3, pp. 957-1332: Vol. 4, pp. 1333-1733

Administrative Courts, French:—con.

- recommendations1472-73
- recours en annulation1424
 - expansion of1427-28
- recours parallèle1428n
- recours pour excès de pouvoir
 -1426-42
- appeal1429
- grounds for action1429-42
 - classification of1429-30
 - détournement de pouvoir (wrongful exercise of power) ..1438-41
 - action not in public interest
 -1439
 - comparable powers in Ontario
 -1468-71
 - improper political purposes
 -1440
 - interest of third persons ..1440
 - principle of1439
 - public interest, other than as empowered1440
 - wrong purposes1441
- incompétence1430-34
 - incompétence *ratione loci* ..1433
 - incompétence *ratione materiae*
 -1431-33
 - incompétence *ratione temporis*
 -1433-34
- vice de forme (defect in form)
 -1434-36
- exceptional circumstances
 -1435-36
- importance of question of form
 -1434
- "substantial" formality ..1434-36
- violation de la loi (breach of law)
 -1436-37
- violation des principes généraux du droit1441-42
- history of action1427-29
- influence of Conseil d'Etat1428
- jurisdiction of Tribunaux Administratifs1427-28
- ordre public1429-31
- retroactive effect of annulment.1458
- remedies, two main types1424-26

Administrative Courts, French:—con.

- reorganization of1421, 1428
 - retroactive effect of some administrative actions1443
 - separation of powers1415-16
 - supervision of delegation of authority
 -1450-51
 - supervision of discretionary powers
 -1447
 - violation of fundamental liberties
 -1443-44
 - violation of "res judicata"1444-45
 - written law, dependence on rules outside1441-42
- Administrative Powers of Decision: see also Statutory Powers, Statutory Powers Procedure Act**
- appeals from decisions1546-47
 - control over
 - Ontario system compared with French1462-64, 1468-72
 - definition28-30, 107, 121, 1536
 - distinguished from judicial power
 -28, 54-5, 83, 991-92
- France:**
- control by Conseil d'Etat
 -1431-32, 1444
 - necessity of95-6
 - objective ingredients
 - action required to carry the decision into effect89
 - conditions precedent71-6
 - preliminary facts72-4
 - preliminary matters of law74
 - preliminary matters of mixed law and fact75-6
 - considerations to be taken into
 - account82-5
 - the decision, delegation85-8
 - impartiality76-9
 - interest or bias77-8
 - prosecutor and judge in the same cause79
 - limitations on scope79-82
 - collateral matters81-2
 - procedural safeguards206-23

- Administrative Powers of Decision:**—*con.*
 subjective ingredients
 conditions precedent90-3
 considerations to be taken into
 account94
 limitations on scope93
- Administrative Procedure:**
 England182-205
 Council on Tribunals202-5
 Donoughmore Committee, pro-
 cedural recommendations of
 184-86
 Franks Committee—*see Franks
 Committee*
 natural justice, rules of182-4
 Ontario136-47
 natural justice, application of pro-
 cedural rules of137-46
 where the statute does not pre-
 scribe any procedure138-44
 where the statute prescribes a
 procedure141-46
 uncertainty of the law146-47
 United States148-81
 adoption and publication of rules
 159-60
 application of Administrative Pro-
 cedure Acts152-58
 declaratory decisions180-81
 Federal Act: *see Federal Administra-
 tive Procedure Act*
 “Model Act”: *see Revised State
 Administrative Procedure Act*
- Agency, American:** *see Tribunals;
 United States*
- Alberta:**
 freedom of the press1601-2
 Ombudsman1340
 referendum on Liquor Act1605
- Amending Process:**
 distribution of legislative powers
 1543, 1597-98
 entrenched Acts, of
 by referendum1604-6
 by special majority1598-1604
 flexibility, need for1590-91
 judicial1581-82
- Appeal:**
 bail on752-54
 from committal order442
 from conviction,
 for indictable offences508-9
 for summary offences507-8, 753
 from coroner's order496
 costs786-87, 792
 to county or district court785-86
 to Court of Appeal791-92
 by Crown790-91
 from disciplinary hearings1202
 England665, 790
 from expropriation determination or
 order1062-66, 1069-71
 from family benefits board of review
 1111
 French administrative law
 1417, 1420-22
 jurisdiction655-61, 666-69
 from Lands Tribunal1046
 from licensing tribunals1128-32
 principles governing227, 233-35
 under Public Inquiries Act453-57
 recommendations
 appellate structure of the courts
 662-66, 669-71
 convictions for offences against
 provincial law793-94
 right of51, 226
 under named statutes672-77
 variations in229-33
 scope228
 by stated case783-84
 trial *de novo*787-90
- Appellate Courts:**654-77
 Appellate Division of the High Court
 of Justice (proposed)665-68
 jurisdiction655-61
 Court of Appeal659-69
 judges of the Supreme Court .658-59
 recommendations669-71
- Appraisers:** *see Expropriation*
- Arbitration:** *see also under
 Expropriation*
 judges acting on
 687, 696, 698, 705-8, 716
- Vol. 1, pp. 1-498: Vol. 2, pp. 499-956: Vol. 3, pp. 957-1332: Vol. 4, pp. 1333-1733**

Arbitration:—con.

- labour706-8
- official arbitrator705, 1032-34

Arrest, Power of:

- definition725
- Game and Fish Act734-37
- Highway Traffic Act728-31, 736
- Liquor Control Act731-33, 736
- Liquor Licence Act733-34
- Mental Health Act1233
- method725
- persons from outside the province
.....737-38
- recommendations741-42
- release from detention750
- right of seizure740-41
- traffic ticket summons issued under the
Summary Convictions Act ...740
- with warrant738-40
- without warrant728-37, 1233

Attorney-General: see also Crown*Attorney; Police*

- annual report of951
- departmental solicitors943
- England939
- functions and duties of
 - government litigation, supervision
of942
 - law enforcement, supervision of
.....937-39
 - legislation, supervision of ...942-47
 - machinery of justice, supervision of
the936-38
 - prosecutions on behalf of the
Crown, supervision of939-42
- history of office931-35
- legal adviser to government ...1467-68
- Legislative Branch of Department
(proposed)949
- recommendations955-56
- reorganization of legal services .948-51
- Scotland758

Attorney General Act: need for .952-56**Austin, John, theory of sovereignty:**

-1484-85
- comments on1486, 1491, 1532

Austin, John, theory of sovereignty:—con.

- implications of1485
- no application to the English
constitution1487-88

Bail:

- before arraignment745-47
- on arraignment751
- bondsman749
- on committal751
- on conviction for indictable offences
.....752
- on conviction for summary offences
.....752-54
- judicial review744
- order for747-50
- principles governing743-44
- recommendations750, 754

Bailiff:

- execution directed to640-41
- fees629
- function628
- office of631

**Beck, Stanley, on congressional law re
electronic eavesdropping: .1583-85****Bill of Rights: see also Canadian Bill of
Rights**

- application of Austin's theory ...1485
- basis of demand for1480
- complexity of1480
- conclusions1595-1610
- "constitutional", use of word
.....1481-82, 1528-29
- entrenchment of: *See Entrenchment*
- form it should take1565-70
- form chosen secondary1577
- freedoms or liberties1493-97
 - defined1494
 - distinguished from rights and
powers1493, 1527
- Ontario Bill of Rights1598-1607
- parliamentary v. judicial supremacy
.....1497-98, 1565-76
- political rights1561
- powers and rights1493

Bill of Rights:—con.

- purpose of1494
- recommendations1607-10
- right to vote:
 - difficulty of defining1596
 - importance of
 -1534, 1545-46, 1552, 1561, 1574
- rights and freedoms essential to parliamentary democracy
 -1571, 1595-96
- institutional requisites for ..1571-74
- rights of people v. rights of government1588-89
- Saskatchewan Bill of Rights ..1650-52
- self-incrimination, American experience1611-25

Bill of Rights (1689):351

Boards: *see Tribunals*

Bracton: on basis of English constitutional law1488

Brown, L. Neville: on adoption of French administrative courts
.....1413-14, 1467

Cabinet System: compared with Congressional committees1581

Canadian Bill of Rights:
.....3, 1539-40, 1544

- effect on other statutes1551
- entrenchment1597-98

Canadian Charter of Human Rights:
(Federal White Paper) ...1578-79

- judicial supremacy1588-90
- right to vote1590

Certiorari:

- committal for trial, review by771
- definition240
- judicial review by
 -239, 245, 257, 303, 316
- procedure317, 319, 664
- regulations, review by380

"Clearly Erroneous" Rule: ..173, 292-93

Collateral Matters: ...81-2, 293-94, 308

Committal Orders: *see Contempt of Court*

Compensation:

- for expropriation52, 963-65, 1011-12, 1018, 1027-29, 1562
- England
 -1022, 1046, 1052, 1055, 1080
- India1517
- Lands Tribunal .1045-47, 1052, 1059
- Nigeria1515-17
- Northern Ireland1517-18
- recommendations ..1083, 1087-1091
- innocent persons convicted of crimes
 -833-44
- recommendations844
- Scandinavia836-37, 842
- United States836, 837-42
- private citizens enforcing law ..847-54
- California852
- Great Britain850-51
- recommendations854
- victims of crime845-47
- Great Britain850-51

Compulsory Purchase: *see also**Expropriation*

- disposal of land after1073
- exchange of information1022
- expert appraisers1080
- expert witnesses, number of1059
- Franks committee, recommendations
 -194-200
- inquiry procedure1005-6
- inquiry officer, the report of .1007-8
- procedure at the hearing1007
- inquiry tribunal1004-5
- interlocutory applications1055
- judicial review1009
- Lands Tribunal1046
- production of documents1052-54
- subject to ministerial approval ...993

Conseil Constitutionnel: function of
.....1433

Conseil d'Etat:35, 241
see also Administrative Courts, French

- as administrative court1420-23
- advisory function of judges1467

Conseil d'Etat:—con.

as appeal court1421-22
 citizen's right of appeal to

.....1417, 1420-21

composition of1418-19

as cour de cassation1422

as court of first instance1422

enforcement of decisions1425

functions of21-9, 1418-23

as organe consultatif1419-20

origins1416-17, 1422, 1427

power to render binding decision

.....1417

procedure, special features of .1460-61

contradictory1461

essentially written1461

inquisitorial1460-61

not conducted in public1461

suspension of administrative decision
 (sursis)1455

Conseil de Préfecture:1417

appeals from1420

replaced1421

Conseil Général:1426

Constitution: *see also Amending Process*

British, Goodhart's four principles of
1488-90

conventions of1541-42

Constitutional Law:1481-92

Austin's theory of sovereignty

.....1484-85, 1491

in the broad sense1482-83

Dicey's theory of sovereignty1486

division of legislative powers 1490-92

in limited senses1483-90

procedural definitions1484

as public law defined1482-83

sovereignty of ideas of the people
1486-90

in the United Kingdom1483-84

in the United States1491

Contempt of Court:

coroner's power to commit for ...495

for non-payment of judgments 636-40

for non-testimonial offence437

officials' power to commit for ..945-46

procedure in preliminary hearings

.....766-67

recommendations ...443-44, 446, 769

tribunals' power to commit for 441-46

United Kingdom445, 756

United States445

Contracts:

between government and citizen, juris-
 diction over1414, 1471

Coode's formula for framing legislation:

.....72-73

Coroners:482-97

appointment of483-85

duties of the supervising coroner
485-86

England482, 484, 489, 491-93

financial obligation for ...897, 908-9

inquests488-96

contempt of court494-96

court reporters806-7

publication of proceedings, limita-
 tion on492-94

purpose490-91

right to appear by counsel ...491-92

who should preside488-90

investigations

publicity of487-88

purpose486-87

recommendations496-97

Corry, J. A.:

on the basis of democracy ...1574-76

on the electoral mandate

.....1545-46, 1552, 1574

Costs:

appeals to the county or district

court786-87

appeals to the Court of Appeal ...792

arbitration proceedings ...1038, 1061

self-governing professions and occupa-
 tions1196-97

Council on Tribunals, (U.K.):

.....112-13, 1413

and the Franks Committee

.....189, 201, 203-5

Council on Tribunals (U.K.):—con.

- operation of202-5
- inquiries205
- complaints205
- procedure205
- visits205
- tribunals203-5
- consideration of complaints 204-5
- procedure of203-4
- visits to203

Tribunals and Inquiries Act (1958)
..... 200-02

Counsel, right to: Report No. 1 *passim***County and District Courts:**

- appeals to785-86
- appellate jurisdiction ..655-58, 672-73
- clerks909
- court reporters801-2, 897-98
- history of606-8
- judges605, 718
- allowances for extra judicial services
..... 690-95
- criminal jurisdiction exercised by
..... 611
- removal of1395, 1401-3
- surrogate court jurisdiction exer-
cised by610-11
- jurisdiction of606-19
- present monetary608-10
- reorganization of611-19
- recommendations619-20
- salaries702-4, 909

Court Houses:905-6

Court of King's Bench:869, 872-73

Court of Requests:606, 869, 873

Court Reporters:

- coroner's inquests806-7
- county and district courts
.....801-2, 897-98
- division courts805-6
- England797
- expropriation arbitrations1061
- functions795-96
- Juvenile and Family Courts805
- magistrate's courts803
- qualifications796

Court Reporters:—con.

- recommendations811-12
- Royal Commissions807
- salary ..798, 800-6 *passim*, 809-10, 910
- special examiners807-9
- supervision of800
- Supreme Court800-1
- training798-99
- tribunals807

Courts of Justice: *see also named courts*

- appeals51
- complaints re conduct of ...1393-1403
- constitutional provisions concerning
.....1401
- costs incurred through judicial
error1404-5
- further safeguards needed
..... 1396-1403
- criminal509-10
- decisions based on evidence and judi-
cial notice51
- establishment of33
- impartiality of47-9
- independence of46-7
- inspection of1344
- just procedure49-50
- precedent, significance of following
.....1531, 1546
- provincial jurisdiction re ...503, 510
- public hearings50
- qualification of judges49
- reasons for decisions51
- Swedish:
inspection of, by Ombudsman 1343
- supervision of, by Ombudsman
.....1344

Criminal Law and Procedure:

- appeals507-9
- county court jurisdiction re611
- due process of law1509-11
- England616, 618
- indictable offences504, 508-9
- magistrate's court re526, 531
- parliamentary jurisdiction re ...503-4
- summary offences504, 507-8
- trials505-7

Crown Attorney: *see also Attorney**General*

appointment	941-42
as Clerk of the Peace	940
fees	898-99, 909-10
functions and duties	940
recommendations	955
salary	940-41

Damages:

awards in Supreme Court	612
-------------------------------	-----

Davis, Prof. K. C.:

on adjudicative and legislative facts	156, 169
on hearings	154-57
on importance of procedure	206-7
on judicial review in the United States	322-24
on matters of law and of fact in the United States	283-85

Declaratory Action:

definition	240
judicial review by	316
procedure	317
regulations, review by	380

Declaratory Decisions:180, 223**Delegation:**

express power of	87
implied power of	88
investigatory powers	398
legislative power of	1237
re licensing	1116-17
ministerial	88, 128
rule against	86
United States	117-18, 161

Denmark:

Administrative Procedure Act	1346, 1351
Court of Complaints	1400, 1402
Ombudsman in	1340, 1346-52
civil servants	1351-52
duty to governments	1351
functions of	1347-48
legal basis of the office	1347
powers of	1350-52
compulsion	1350

Denmark:—con.**Ombudsman in—con.**

information, right to get	1350
investigatory	1350
lack of administrative courts in Denmark	1351
scope of authority	1348-49
central government	1348
complaints	1349-50
local government	1348-49
secrecy	1350

Dicey, A. V.:

on parliamentary sovereignty	1486
the Rule of Law	56-9, 77

Directive Principles:

in interpretation of statutes ..	1547-53
justiciable or not	1550-53

Discretionary Power:

definition	30-1
judicial	23n
United States	286

Discrimination:1518-26

children	1519
corporate bodies	1521-25
mentally ill	1519-20
prohibited bases of	1525-26
right to vote	1520
self-governing professions	1520-21
social security	1562-63

District Court: *see County and District Courts***Division Court:**

bailiff	628-29, 631, 640-41
claims in	648
clerk	627, 629, 631
committal for contempt	636-40
court reporter	805-6
execution in	640-42
fees	629-31, 635, 702-4
function	621
judicial officer	625-27, 643-44
jurisdiction	621-24
jury fund	635-36
jury trial	634-36
procedure in	631-35
recommendations	644-45

Division Court:—con.

- reorganization of642-43
- volume of claims (1966)647

Documents:

- production in investigation406-7
- production on judicial review ...1471
- recommendations409
- return of407-8

Donoughmore Committee on Ministers' Powers (U.K.):106-11, 121

- amendment of the parent Act by regulations345
- establishment of standing committees to review bills370-72
- prior publication of regulations ...363
- procedure for judicial review ...319-20
- procedure of administrative tribunals184-86
- rules of Natural Justice182-84

Duff, C. J.:

- the constitution as an instrument of the democratic process1601-3
- judicial review259
- the right of public discussion1495, 1497n

Elections: importance of,

-1545-46, 1552, 1574, 1590

Electronic Eavesdropping: need for control of:

- Canadian and United States compared1581-85
- wiretapping938

Eminent Domain: see Expropriation**Enforcement of Rights Legislation:**

-1555-64
- conflict1555-56
 - between private persons1555-60
 - between private persons and governments1556, 1560-64
 - differences between private and public relationships1560
- expropriation1562
- personal economic security1562-63

Enforcement of Rights Legislation:—con.**conflict—con.**

- personal physical security and freedom1561-62
- regulation of career or business opportunities1562

Ontario Human Rights Commission1556-60**Entrenchment, constitutional, of bill of**

- rights:1543-44, 1546, 1577-94
- amending process

-1566, 1569, 1590-91, 1595

Austin's and Dicey's theory 1485, 1491**authoritative status**1543-44, 1578**comparisons with United States**

-1523-24, 1578-80

dangers of1568-70, 1596, 1604**international law**1593-94**judicial supremacy** 1570, 1586-90, 1592**methods of**1598-1606**referendum**1604-6**special majority**1598-1604**parliamentary supremacy**1589-90**religious freedom, Canada and U.S.**

- compared1578

rights and freedoms basic to parliamentary democracy 1571, 1595-96**institutional requisites for** 1571-74**value of**1529, 1577-78**Entry on to Premises: see also Search**

- entry only with permission of the court412-16

express power410-11**implied power**411**judicial approval**417**private dwellings**418-19**search warrant**417-18**Equality Before the Law:**

-1502, 1507-8, 1518-26

*see also Discrimination***Evidence:****arbitration in expropriation**

- proceedings1058

re criminal trials1237**disclosure of, obtained on statutory**

- inquiry458-62

Evidence:—con.

- England, tribunals in192
- exclusionary rules of814-16
- expropriation hearing re1007
- illegally obtained, admissibility in
 courts:
- Canada and United States compared
 1579-80
- degrees of illegality1580-81
- recommendations re tribunals
 216, 219-20
- re self-governing professions and oc-
 cupations1198-99
- United States, tribunals in
 167, 172, 177

Executive Power:

- categories of38-41
- controls on43-5
- definition39, 42
- distinguished from legislative power,
 judicial power20
- ministerial responsibility44, 126

Expropriation:

- abandonment of land1072-73
- appeals1062-66
- appraisers1059-60, 1079-80
- approval authorities ..987-90, 994-1001
- arbitration1066-71
 - the arbitral tribunal1031-37
 - the official arbitrator1034
 - the Ontario Municipal Board
 1035-37
 - the senior judge of the county and
 district court1034
- Board of arbitration under the
 Ontario Energy Board
 - Act, 19641042-44
 - fees of arbitrators1037-39
 - independence of arbitrator 1039-40
 - Ontario Municipal Board, arbitral
 functions of1040-42
 - right to arbitrate1030-31
- arbitration hearing1057-61
 - costs1038, 1061
 - evidence1058
 - expert witnesses, number of 1059-60

Expropriation:—con.

- arbitration hearing—con.
 - onus of proof1058-59
 - shorthand reporter1061
 - stated case1060
 - taking a view1058
 - who should begin1057
 - written reasons for decisions
 1060-61
- arbitration procedure1048-61
 - discovery1054-55
 - interlocutory applications ..1055-56
 - notice of arbitration1050
 - pleadings1050-51
 - production and discovery ..1051-55
- Australia963
- board of negotiation1020-21
- compensation
 - 52, 963-65, 1011-12, 1018, 1027-29
 - India1517
 - New York State1630, 1641-44
 - Nigeria1515-17
 - Northern Ireland1517-18
- compulsory purchase: *see Compulsory
 Purchase*
- controls on986-1009
 - approval991-93
 - approval authorities987-89
 - grounds for990
 - owner's right to a hearing ..990-91
 - provisions requiring approval
 986-87
 - recommended approving
 authorities994-1001
 - definition962
 - disposal of land after1073-78
 - expropriating authorities975-79
 - hearing re990-91, 1002, 1007-8
 - inquiry system1001-8
 - inquiry procedure1005-8
 - approval1009
 - at the hearing1007
 - prior to hearing1006
 - report of the inquiry officer 1007-8
 - inquiry tribunal1004-5
 - right to a hearing1001-4

Expropriation:—con.

- judicial review1009
- Lands Tribunal ..1045-47, 1052, 1059
- notice1013-17
- "owner" defined961, 1014
- power to expropriate962-81
 - bodies and persons having ...965-74
 - constitutional limitations on 963-64
 - expression of the982-84
- Expropriation Procedures Act, 1962-63965
- guidelines governing conferment980-81
- incidence of974-75
- not to be readily implied964
- stated purposes of984-85
- strict compliance with conditions precedent964-65
- procedure993, 1010-29
 - amount of compensation to be offered1027-29
 - exchange of information ..1021-23
 - failure to serve notice1016-17
 - negotiation prior to arbitration1017-21
 - notice of expropriation1013-16
 - possession by the expropriating authority1023-27
 - recommendations994-98, 1083-92
 - United Kingdom ..999, 1004-6, 1008-9
 - United States52, 962-63

Family Benefits Act:

- administrative scheme of1139-49
- allowances and benefits distinguished146n, 1140-41
- history of1136-38
- nature and scope of powers conferred1141-49
 - investigatory powers1141-44
 - miscellaneous powers1148-49
 - powers of decision1144-49
 - eligibility for and amount of assistance1145-46, 1149
 - variation, suspension and cancellation of assistance1146-48

Family Benefits Act:—con.

- recommendations1156-57
- structure and procedure of tribunals under:1150-57
 - appeals to the courts1156
 - procedure1152-56
 - boards of review1154-56
 - Director's decisions1152-54
 - structure and organization of tribunals1150-52
 - the board of review1151-52
 - the Director1150-51

Family Court: see *Juvenile and Family Court***Farm Products Marketing Board:**

- licensing powers1105, 1109-10

Federal Administrative Procedure Act (U.S.):

- burden of proof177
- consultation: separation of functions of prosecuting and deciding officers178
- counsel for witness177
- evidence177
- hearing officer's functions179-80
- hearing officer's power179
- licences180
- official notice178
- publication of rules159
- record179
- subpoenas178-79

Fees:

- arbitrator1037-39, 1069
- Division Court629-31
- interpreter523
- jury856-59
- Justice of the Peace521-22
- licensing353
- magistrate's court903-4, 919A-E
- peace officer522-23
- recommendations863-64
- self-governing professions and occupations, membership in353
- witness523, 861-63

Fines:

- breach of federal law914
- breach of provincial law913-14
- magistrate's court
.....536, 545-46, 903-4, 919A-E
- paid to other than Province915-19
- recommendations928, 1195, 1207
- self-governing professions and occupa-
tions, as sanctions1195, 1206-7

**Franks Committee on Administrative
Tribunals and Inquiries (U.K.):**

-111-12, 321, 1410-11
- on appeals from decisions of judicial
tribunals233
- on inquiries113-14, 194-200
- inspectors, selection of1004-5
- inspectors' reports197-98
- contents of report197
- corrections of facts198
- procedure after the inquiry 198-200
- the decisions198-99
- new facts199
- notification of decision ...199-200
- substantial understanding of case
by deciding officer199
- procedure at the inquiry196-97
- evidence197
- examination and cross-examina-
tion197
- material in support of the
proposal196
- oaths197
- official witnesses197
- order of proceedings197
- procedure in general196
- public inquiry196
- subpoenas197
- procedure before the inquiry 195-96
- statement of case195-96
- statement of ministerial policy 196
- on prior publication or regulations
.....363
- on self-governing professions and oc-
cupations1197
- on tribunals112-13, 188-94

**Franks Committee on Administrative
Tribunals and Inquiries (U.K.):**
*con.*on tribunals—*con.*

- procedure after the tribunal hearing
.....193-94
- decision on the record193
- notification of decision194
- reasons193
- tribunal hearing and deciding 193
- procedure at the tribunal hearing
.....191-93
- attendance191
- counsel192
- evidence192-93
- examination and cross-examina-
tion192
- oath192
- order of proceedings191
- privilege192
- public hearings191
- subpoenas192
- procedure before the tribunal hear-
ing191
- information on rights191
- notice of issues191

Garner, J. F.:

- on adoption of French system of ad-
ministrative courts ..1413-14, 1467

Gellhorn, W.:

- on inspection of courts in Sweden
.....1343-44
- on the Ombudsman in Sweden
.....1385-86
- and the press1345

General Medical Council (England):

-1162, 1165-66, 1187-88, 1198

**Glassco Commission on Government
Organization**

-949-50

Goodhart, Sir Arthur: ..1476, 1541, 1545

- four basic principles of the English
Constitution1488-90
- on Parliament prolonging its own
life1574

**Gordon Commission on organization of
Government in Ontario:**320

Grand Jury:

- advantages and disadvantages of780-82
- fees900
- re gaol delivery778-79
- history772-75
- re bills of indictment775-77
- re inspection of public institutions.778
- recommendations of779-80
- recommendations re781-82

Great Britain: *see United Kingdom***Habeas Corpus:**

- committal for trial, review by771
- judicial review by239
- procedure668

Hamson, C. J.:

- on administrative court1411
- on delay in French administrative courts1463

Hearings:

- arbitration—*see under arbitration*
- Franks Committee recommendations194
- licensing tribunals1120
- recommendations1132
- public50
- self-governing professions and occupations — *see under Self-Governing Professions and Occupations*
- types of156
- when required157

High Court of Justice for Ontario:

- see also Supreme Court of Ontario*
- Appellate Division of (recommended)665-68
- judges of651
- jurisdiction651-52
- sittings652-53

Hoover Commission Task Force on Legal Services and Procedure

(U.S.)292

Hurwitz, Stephan: (Danish Ombudsman)

-1346-47, 1351
- on the office of the Ombudsman ..1352

Indictable Offences:

- appeals508-9
- bail752
- creation of504, 727
- Juvenile Delinquents' Act550
- trial in magistrate's court526
- trial procedure505-6, 755

Injunction:

- definition240
- judicial review by316
- procedure317
- regulations, reviewed by380

Inns of Court Conservative and Unionist Society:

- administrative court proposed by1410, 1414, 1467

Inquest: *see under Coroners***Inquiry:** *see Investigatory Powers; also under Franks Committee***International Commission of Jurists:** 58

- the Rule of Law58-9

Investigatory Powers:

- appeals from exercise of453-57
- recommendations457
- committal to prison, power of ..441-46
- conditions precedent to the exercise of388-91
- recommendations390-91
- definition386
- entry, powers of: *see Entry onto Premises*
- evidence, disclosure of458-62
- recommendations462
- expropriation inquiry tribunal1004-8
- family benefits1141-44
- judicial review of390, 398, 412
- procedural rights of persons affected447-52.
- recommendations451-52
- rights affected by386
- scope392-99
- definition of purpose393-96
- permissible areas of investigation398-99
- recommendations399-400

Investigatory Powers:—con.

- search and seizure: *see Search; Seizure*
- to stop and detain423-25
- recommendations425
- summonses to witnesses and production401-9
- demand for the production of documents and other information406-7
- recommendations408-9
- the right to the return of documents seized407-8
- summonses or subpoenas to appear401-6
- form of403-5
- powers directly conferred ...403
- powers of a court in civil cases, statutory provisions conferring402, 477-81
- powers of Commissioner under the Public Inquiries Act, statutory provisions conferring 402, 466-77
- witness fees405-6
- witnesses: *see Witnesses*

Jaffe, L. L.:

- on "jurisdictional facts"294-98
- on matters of law and of fact in United States285-87
- on "reasoning mind" vs. "reasonable man"312-13

Jails: financial responsibility for

-905-6, 912

Jennings, Sir Ivor:1488, 1541

- on the meaning of "constitutional law"1483-84

Judges: *see also under Courts of Justice; and under named courts*

- in administrative courts, France and Ontario compared1464
- appointment33, 509-10
- extra-judicial employment ...681-722
- appointment to682
- as arbitrators687, 696, 698, 716, 1039
- labour706-8
- municipal705-6

Judges:—con.**extra-judicial employment—con.**

- as commissioners687, 696, 698, 716, 719
- as conciliators708-10
- county court judges, allowances to690-95
- division court702-4
- Extra-Judicial Services Act ...710-16
- extra remuneration682, 684-85,688-98, 702-4, 708-9, 716, 719
- independence of the judiciary ..717
- Judges Act684-89, 695-98
- Juvenile and Family Court ...702-4
- as police commissioners700-4
- recommendations721-22
- Supreme Court judges, allowances to690
- independence of46-7, 717, 1396-97, 1572-73
- misconduct of1393-1403
- provincial courts
 - provision for removal of1394-95, 1401
- salary683, 702-4, 720
- specialization in administrative law1464-65
- superior court:
 - powers of1465-66
 - provision for removal of1395-96, 1401-3

Judicial Council (recommended):

-1394-95, 1402-3
- recommendations1406-7

Judicial Powers of Decision:

- definition ..28, 106, 121, 1181, 1536-37
- distinguished from administrative power28, 54-5, 83
- distinguished from legislative power, executive power20-1
- judicial decision, distinguished from administrative decision991-92
- objective ingredients—*see under Administrative Powers of Decision*
- quasi-judicial power29, 106
- subjective ingredients—*see under Administrative Powers of Decision*

Judicial Review:

- by Appellate Division of the High Court of Justice for Ontario (proposed)665-68
- of bail order744
- by *certiorari* ...239, 248, 257, 303, 316
- definition238, 654
- enforcement of public duties ...264-66
- in England321-22
- expertise of reviewing body ...1464-65
- of expropriation hearing1009
- grounds for247-66, 293, 300
- re investigatory powers ...390, 398, 412
- re licensing tribunals1128
- nature, of35, 51-2
- principles governing.242-43, 302-4, 310
- procedure316-24
 - action without power316-18
 - in England321-22
 - refusal to act318-19
 - in United States322-24
- recommendations and conclusions304-15, 319-20, 325-32, 1467
- of regulations354, 380-81
- scope242
- statutory restrictions on267-79
 - conclusions277-79
 - conclusive certificates273-74
 - decisions not to be quashed if no substantial wrong or injustice274-75
 - finality clauses268-69
 - restrictions of the record274
 - statutory provisions barring remedies for review269-73
 - subjective ingredients275
- substantive law, conclusions and recommendations302-15
- ultra vires* doctrine, application of247-61
 - objective ingredients, absence of or non-compliance with249-57
 - subjective ingredients, absence of or non-compliance with257-61
- in United States280-304, 310
 - conclusions of law and findings of fact distinguished283-90

Judicial Review:—con.

- in United States—con.
 - differences from Ontario ...281-82
 - doctrine of prejudicial error in the301
 - jurisdictional facts293-98
 - principle of *ultra vires*, application of282
 - procedure322-24
 - federal administrative remedies322
 - state administrative remedies322-24
 - scope of review on findings of fact291-93
 - scope of review on questions of law290-91
 - statutory provisions in ...298-300

Judicial Supremacy:

- constitutional entrenchment of a Bill of Rights.1567, 1570, 1586-90, 1592
- parliamentary supremacy:
 - blending of, in protection of human rights and freedoms1497-98, 1565-76
 - Canada and United States1585-89, 1592

Jurisdiction: definition of244-46**"Jurisdictional facts":294-97, 300****Jury:**

- civil cases859-60
- criminal cases763-64
- division court cases634-35
- division court fund635-36
- England855-56, 859
- fees856-59, 878, 887, 900
- recommendations864

Justices of the Peace:513-25, 739

- fee system521-24
- history,
 - in Canada515
 - in England513-15
 - in Ontario515-19, 868-69
- The Justices of the Peace Act901
- training of519-21

Juvenile and Family Court:

- appointment and qualification.558-63
- court reporters805
- England572-73
- establishment of901-2
- financial administration of
.....563-68, 901-2
- history547-48
- jurisdiction549-54, 556-58
- territorial568-69
- Juvenile Delinquents Act550-54
- "law guardian"601
- procedure554-56, 572-604
- recommendations569-70
- salaries702-4
- Scotland573-75
- in United States575-603

Kenny: on principles governing bail.744

**Killbrandon Report on Children and
Young Persons (Scotland)** ..573-75

Lands Tribunal:

- England1052, 1059
- Ontario (recommended)1045-47

Laskin, J. A.:

- classification of rights and freedoms
.....1527-28
- on the disciplinary tribunal1186
- on review of committal for trial...771

"Law Guardian":601

Legal Aid:1510-11

- and Articles 9, 10 and 11 (1) of the
U.N. Universal Declaration of
Human Rights1511
- in French administrative courts ..1460
- system in Ontario1464

"Legal Residuum" Rule:173

Legal Services: reorganization of in gov-
ernment departments948-51

- annual reports951
- legal advice to departments950
- recommendations949-50

Legislative Facts: definition156-57

Legislative Power:—*see also Subordinate
Legislative Power*

- definition19
- distinguished from judicial power,
Executive power20-1
- exercise of21, 26, 35-6
- function20
- political control of36-8

Licensing:

- appeals1128-32
- delegation1116-17
- fees353
- judicial review1128
- judicial safeguards1128-32
- legislative considerations re.1096, 1117
- limitation of number issued ..1107-10
- procedural safeguards1120-27
- purposes of power to be stated
.....1098-1100
- recommendations1117-19, 1132-34
- revocation of licences
.....1097-98, 1123-24, 1126

- standards, need for definition of.1100-7
- suspension of licences1097-98
- transfer of licences1110-14
- tribunals, structure and organization
of1115-16
- in United States ..175-76, 180, 1122-23

Liquor Control Board:

- power to create offences731
- power to expropriate980-81

Liquor Licence Board: powers of ...421

Local Government Board (U.K.).183-84

Magistrates:

- accommodations538-39
- appointment of527, 539-42
- case lists531
- costs532-36
- court reporter803
- England540
- extra-judicial employment542-43
- fees903-4, 919A-E
- finances536, 545-46, 903-4, 919A-E
- jurisdiction of526-27
- part-time529-30

Magistrates:—con.

- prosecution before531-32
- recommendations543-44
- salary527-29, 903-4
- staff530-31

Mandamus:

- definition240
- procedure317-19, 664
- regulations, review by380

Mayor's Court:874**McWhinney, Edward:**

- proposal for an administrative law
high court1410

Mentally Ill:

- administration of estates of, by
Public Trustee1239-52
- limitations of actions1249-51
- mental incompetency proceedings
.....1251-52
- patients in psychiatric facilities
.....1239-40
- powers of investigation1246-47
- trusteeship, effect of1240-42
- criminal law applicable to1236-37
- discrimination, legislative, applicable
to1519-20
- hospitalization1232-35
- psychiatric facilities ..1231-32, 1237-38
- recommendations1252-54
- right to vote1235-36, 1596

**Ministerial Power: see Executive power;
Donoughmore Committee****Mitchell, J. D. B.:**

- administrative court proposed.1412-14
- arguments against1467

**Model Act (U.S.): see Revised State Ad-
ministrative Procedure Act****Montesquieu: on separation of powers
.....1415-16****Municipal Government:**

- need for an Ombudsman1387-88

**National Conference of Commissions
on Uniform State Laws (U.S.):
.....150, 293****Natural Justice:**

- in administrative tribunals182-84
- procedural rules of76, 137-47
- subordinate legislative power..339, 362

New York State:

- amending process1626-27
- Bill of Rights1627-34
- Constitution of1626-49
- referendum on constitutional amend-
ments1605-6

New Zealand:

- no Administrative Procedure Act.1359
- Parliamentary Commissioner
(Ombudsman)1340, 1353-73,
1383, 1387, 1389, 1393
- amendments to the law, suggestions
for1373
- complaints,
investigation of1355-57
- schedule of, for year 1968..1359-72
- functions of1354
- history1353-54
- jurisdiction of1357-58
- local government matters1373
- secrecy1355-56
- social security laws1359

**News Media:—see also Publication of
Proceedings before trial; and see
under Coroners****in Sweden:**

- relations with the Ombudsman
.....1345

Notice to Attend:430**Official Notice:**

- in tribunals217
- United States168-70

Olivecrona: on the basic ideas of the

- Constitution1487

Ombudsman:6, 1338-1407

- in Denmark1346-52
- in Great Britain1374-82
- in New Zealand (Parliamentary Com-
missioner)1353-73

Ombudsman:—con.

- for Ontario (recommended)1383-85
- complaints re maladministration in the government service ...1388-89
- conclusions1383-90
- municipal ombudsman ...1387-88
- provincial ombudsman ...1388-90
- creation of, form to be taken ..1390
- jurisdiction over judiciary.1399-1400
- procedural rules, need for ..1389-90
- recommendations1405-6
- origins of office1340
- right of appeal1382-85
- in Sweden1341-45

Ontario Energy Board:

- arbitral functions of1042-44

Ontario Flue-Cured Tobacco Growers' Marketing Board:1109**Ontario Human Rights Commission:**

- application of Code to the Ontario Government1560
- education programme1559-60
- investigation and conciliation procedure1556-59
- techniques of persuasion and enforcement1556-60

Ontario Labour Relations Board:

-77, 92-3, 138
- disqualification from, for bias ..252-53
- judicial review of decisions306-7
- publication of decisions223
- witness fees862-63

Ontario Law Reform Commission:

-1472-73
- on cost re expropriation1061
- legislative changes affecting contracts with public authorities1473
- recommendations re expropriations1029

Ontario Municipal Board:29

- arbitral functions of1040-42
- as arbitrator1035-37, 1039-40
- fees or expenses payable1038
- interlocutory applications1055-56
- orders for discovery and production1021-22

Ontario Municipal Board—con.

- powers of437, 439
- production1054

Ontario Securities Commission:

- licensing powers1124

Parliament:**Canadian:**

- law-making power of503-4
- capable of greater flexibility than the courts1581-82, 1585, 1591-93
- doctrine of sovereignty of32
- limitations on, of the Legislature of Ontario32-6

French:

- jurisdiction defined by 1958 Constitution1432-33
- separation of powers1416
- Ontario; law making power of ..503-4
- power to bind successive parliaments1599-1600
- as primary policy-maker ..19, 1567-68
- rules of procedure of House of Commons1541, 1544

Parliamentary Supremacy:25

- concept of1589-93
- entrenchment1566-67
- judicial supremacy:
 - blending of, in protection of human rights and freedoms1497-98, 1565-76
 - Canada and United States1585-89, 1592

Particularization Process:1533-35**Police:—see also Arrest, power of**

- commissions700-4
- financial responsibility for.907, 912-13
- wire-tapping938

Powles, Sir Guy: ..1359, 1373, 1383, 1389

- on the role of the Ombudsman ..1386

Precognitions (Scotland):758-59**Prejudicial Error: doctrine of301****Privacy: invasion by electronic devices in law enforcement1581-85****"Privilege": American doctrine of ...155**

Privileged Communications:

- clergy and parishioner820-21
- discretion826-28
- re Highway Traffic Act828-31
- husband and wife816
- journalists826
- physician and patient821-23
- principle of816-17
- recommendations832
- social workers824-25
- solicitor and client817-19
- in statutory inquiry438-40
- without prejudice statements825

Professions: *see Self-governing Professions and Occupations*

Prohibition:

- definition239
- judicial review by316, 318
- procedure664
- regulations, review by380

Provincial Courts: provision for removal of judges1394-95, 1401

Public Inquiries Act:463-81
see also Investigatory Powers

- recommendations465
- re stated case453, 456
- statutory provisions conferring all the powers that may be conferred on a Commissioner under the, (Appendix A)466-77
- statutory provisions conferring the powers of a court in civil cases (Appendix B)477-81

Public Trustee:

- administration of estates of the mentally ill1239-52
- annual report1247-48
- personal liability of1248-49

Publication of Decisions:—*see under Statutory Powers Procedure Act*

by Income Tax Appeal Board223

Publication of Proceedings before Trial:755-69

- before criminal proceedings are instituted767-68

Publication of Proceedings before Trial:

—*con.*

- coroners inquests and investigations487-88, 492-94
- independence of the courts762
- preliminary inquiry755-56
- procedure in Northern Ireland.759-60
- procedure in Scotland758-59
- recommendations769
- risk of prejudice763
- safeguards763-67
- self-governing Council of News Media (recommended)768-69
- Tucker Committee756-58

Publication of Rules: *see under Statutory Powers Procedure Act*

Quasi-judicial Power:29, 106

Quo Warranto:239

Rand, J.:

- on basic freedoms1561
- on the legal nature of freedoms or rights1496
- on licensing laws1094
- on licensing power255
- on standards of proof before disciplinary bodies1201

Recommendations: (Consolidated Summary of)1255-1331, 1653-62

Regulations: *see also Subordinate Legislative Power*

- amendment of other statutes by343-45
- amendment of parent statute by345-48
- definition, recommended366
- establishing tribunals by355
- judicial review of354, 380-81
- licensing fees under353
- onus of proof under354
- penalties under348-50
- power to tax351-53
- prior publication of363-64
- recommendations376-79
- Registrar of362, 364-65, 368
- retrospective353-54

Regulations:—con.

- review of, by the legislature369-79
- in other jurisdictions370-76
 - Australia372-73
 - Canada374
 - India374
 - Manitoba374-76
 - New Zealand373
 - South Africa373-74
 - United Kingdom371-72
- in Ontario369-70
- Scrutiny committee (recommended)
 - 376-379

Revised State Administrative Procedure Act (Model Act) (U.S.):

- general176
- licences175-76
- where the deciding officers conduct the
 - hearing163-74
 - adjournments167
 - burden of proof167
 - consultation by deciding officers
 - 170-71
 - counsel for the parties164-65
 - counsel for witness165
 - cross-examination167
 - decision173-74
 - decisions on the record171
 - evidence167-68
 - evidence required to support a finding
 -172-73
 - hearings164
 - notice163-64
 - official notice168-70
 - parties163
 - pleadings164
 - pre-hearing conferences164
 - public hearings165
 - record171-72
 - subpoenas and their enforcement
 - 165-66
 - where the deciding officer does not
 - conduct the hearing174-75

Right to vote:1534, 1603-04**Rights:** *see also Bill of Rights***Rights:—con.**

- basic3, 9, 410
- curtailed by investigatory powers
 - 386-7
- encroachment on2, 4, 8, 992
- political and legal forms establishing
 - human rights and freedoms
 - see also Bill of Rights*
 - 1530-54
- authoritative status, alternative
 - forms of1541-53
 - the common law1542, 1546
 - conventions of the constitution
 -1541-42, 1545-46
 - fundamental customary law of the
 - constitution1541, 1545-46
 - rules of procedure of the House of
 - Commons1541, 1544
 - statutes of federal or provincial
 - parliaments1542-43, 1546
 - superior constitutional law
 - (special entrenchment)
 -1543-44, 1546
 - constitutions and legal systems, role
 - of1531-32
- propositions establishing human rights
 - and freedoms1501-29
 - alternative ways of classifying
 - 1526-29
 - characteristics of1502
 - content of, particular and general
 - 1501-2
 - general and particular propositions,
 - the need for both1502-18
 - "equality before the law"
 -1502, 1507-8
 - general propositions not self-
 - defining or self-executing
 - 1508-11
 - meaning and implementation of
 - general propositions ...1508-11
 - need for proper discrimination as
 - well as equalities between individuals and groups, *see Discrimination*
 -1518-26
 - safeguards of4-5, 501-3, 655, 717

- Robson, W. A.:**
 on administrative court of appeal
1411, 1414
- Rowat, D. C.:**
 proposals for Ombudsman1340
- Royal Commission on Bilingualism and Biculturalism:** on languages of instruction, role of the province
 1547-48
- Royal Commission on the Bren Machine Gun Contract:**464
- Royal Commission on Tribunals of Inquiry:**446, 449-50, 453
- Rule of Law:**
 characteristics56
 definition18, 58
 formulation19
 re judicial powers122
 principles95
 search for1480
 sovereignty in ideas of the people
 1486-87

- Search:** *see also Entry onto Premises*
 of person425-26
 recommendations422-23, 426
 warrants413-18

- Seizure:**
 alternatives to421
 authorization for419
 definition419
 recommendations422-23

- Self-governing Professions and Occupations:**
 admission1173
 ancillary occupations1204-5
 by-laws1170-71
 discipline1181-92
 composition of the disciplinary
 tribunal1184-89
 grounds for action1219-27
 powers1181-84
 procedure before bodies ..1193-1203
 comparative analysis of1228
 hearing1193-1203
 costs1196

Self-Governing Professions and Occupations:—*con.*
 discipline—*con.*

- effect of suspension or cancellation of right to practice pending appeal1202-3
 evidence1198-99
 failure to attending hearing
 1194
 notice of hearing1193
 public hearings1197-98
 right of appeal1202
 right to counsel1194-95
 sanctions available1195
 service of notice1193-94
 standard of proof ...1199-1202
 Statutory Powers Procedure Act,
 application of1203
 professional misconduct1189-92
 fines1206-7
 General Medical Council of England
 1162, 1165-66, 1187-88, 1198
 governing bodies of1212
 government control of1212
 limitation periods for bringing actions
 1207-8
 power of self-government1162-66
 power to license1165
 proper legal discrimination ...1520-21
 recommendations1209-11
 rule-making power ..1167-71, 1213-17
 sanctions1195, 1202
 United States1163
- Self-incrimination, American experience:**
 1611-25
 common law protection1612
 extent of the protection1616-20
- Fifth Amendment:**
 adoption of1611-12
 and the *Boyd* case1613-14
 legislative extension of1614-16
 what is protected by it1620-25
- Separation of Powers:**
 doctrine of52-4
 United Kingdom115
 United States115, 118

Sheriffs: remuneration of907-8

Special Examiners: *see Court Reporters*

Stated Case:

arbitration in expropriation1060

to Court of Appeal677

procedure664, 783-84

under Public Inquiries Act ..453, 456

recommendations793

from summary offences507-8

to Supreme Court677

Statutes: *see also Legislative Power*

drafting considerations62, 944-47

interpretation

.....25-6, 136, 244, 281-82, 1506

"justiciable"1546

Statutory Inquiries: *see Investigatory*

Powers

Statutory Powers:

characteristics63-5

investigatory: *see Investigatory Powers*

judicial review of: *see Judicial Review*

objective ingredients of 64-5, 252, 258

principles of101-2

procedural safeguards on exercise of

.....206-23

subjective ingredients64-5, 257-58

subordinate legislative: *see Sub-*

ordinate Legislative Power

types208

Statutory Powers Procedure Act (Bill

130, 1969):1385, 1467, 1596-97

Statutory Powers Procedure Act

(recommended):212-23

declaratory rulings222-23

re licensing tribunals

.....1127, 1133, 1203

minimum rules applying only to judi-

cial tribunals219-20

consultation after hearing220

deciding members must be present

at hearing220

decision on the record219

reporting evidence220

minimum rules of procedure for all

tribunals, with exceptions ..213-19

adjournment213

Statutory Powers Procedure Act

(recommended):—*con.*

minimum rules of procedure for all
tribunals, with exceptions—*con.*

counsel215

counsel for witnesses215-16

the decision217

enforcement of217

enforcement of the orders of

tribunals214

evidence216-17

examination and cross-examination

of witnesses216

hearings214

notice of the case to be met213

notice of hearing213

oaths215

official notice217

privilege in defamation218-19

reasons218

record218

right of appeal218

subpoenas214

publication of decisions223

recommendations211-23, 309-10

rules:

detailed, for all tribunals220-21

effect to be given to222

publication of221

Statutory Powers Rules Committee

(recommended):

.....212, 451, 1241, 1385

constitution of221

Subordinate Legislative Power: *see also*

Regulations

defined21-2, 27, 1536

limitations on scope of338-55

constitutionality38

impartiality339

objective339-42

preliminary matters338-40

subjective342-43

objectionable provisions conferring

.....343-55

amendment of the parent Act

.....345-48

Subordinate Legislative Power:—con.

- objectionable provisions conferring
—con.
- licensing fees353
- onus of proof354
- penalties348-50
- power to amend another Act or
regulations passed under another
Act343-45
- provisions excluding judicial review
..... 354
- regulations establishing judicial or
administrative tribunals355
- retrospective regulations353-54
- sub-delegation350-51
- taxation351-53
- persons on whom power may be
properly conferred336, 356-60
- political control, need for359-60
- procedure that should govern the exer-
cise of361-68
- laying regulations before the Legis-
lature366-68
- prior publication363-64
- procedure antecedent362-63
- procedure subsequent364-66
- subordinate legislation not coming
within the definition "regulation"
..... 366
- standards in municipal by-laws 1101-4
- supervision by the courts of the exer-
cise of380-81

Subpoena:

- form of403
- recommendations408, 430-31
- ad testificandum*438
- traffic ticket, summons740
- tribunals403-5, 428-30

"Substantial Evidence" Rule:

-173, 291-93

"Substantive due process":1523**Summary Offences:**

- appeals507-8, 753
- arrest for728
- bail752-54
- costs532-36, 869-70

Summary Offences:—con.

- creation of504, 727
- fees521-23
- in magistrate's court526-27
- procedure505

Summons: see Subpoena**Supreme Court of Canada:**

- interpretation of constitutional distri-
bution of legislative powers
.....1569, 1572

Supreme Court of Ontario:

- appellate jurisdiction ..655-58, 673-74
- branches651
- court reporters800-1
- damage awards612
- duties of judges of, re estate bills
.....1468
- judiciary, allowances for extra judicial
employment690
- jurisdiction610, 651
- recommendations re production of
documents on judicial review
.....1471-73
- removal of judges1395-6, 1401-3

Surrogate Court:610, 911**Sweden:**

- Ombudsman1340-45, 1385
- choosing of1343
- functions of1343-44
- inspection of government agencies
and the courts1343
- reversal of administrative
decisions1343
- supervision of the courts1344
- history1341
- and the press1345
- secrecy, lack of1345
- supervision of conduct of judges
.....1399

Tarnopolsky, Walter:

- on classification of rights and free-
doms1527-28
- on manner and form requirements for
amendment of statute1599

Training Schools: financial responsibility for908

Trial *de novo*:507-8, 787-90

Tribunal Administratif:
see also Administrative Courts, (French); Conseil d'Etat
.....27, 1421, 1422
delay involved1463
evidence1456
procedure, simple and inexpensive 1459
recours pour excès de pouvoir ...1428
suspension of administrative decision 1455

Tribunal des Conflits (France): ...1463

Tribunals: *see also Statutory Powers*
administrative
.....126-30, 136-47, 211-23, 313-14
definition28
delegation, rule against86
establishment by regulations355
judicial121-25, 211-23, 310-13
Lands Tribunal (proposed) ..1045-47
legislative powers of37-8
official notice in168-70, 217
powers to commit
.....429, 434, 437, 441-46
recommendations101-2
types of228-29, 309-10
United Kingdom
.....105-14, 188-205, 321-22, 1004-6
United States
.....115-19, 148-81, 291, 322-24
witnesses, summoning of427-31

Tribunals and Inquiries Act (U.K.):
.....200-2

Tribunals of Inquiry (Evidence) Act:
.....444-46

Tucker Committee on Proceedings before Examining Justices (U.K.):
.....756-58, 760-61

Ultra Vires:
doctrine of244
"excès de pouvoir"1421

Ultra Vires:—con.
grounds for247-49, 282, 300
judicial review304-8, 315
regulations, review of354, 380

United Kingdom:
Parliamentary Commissioner (Ombudsman)
...1340, 1374-82, 1390, 1393, 1413
Anglo-German agreement of 1964
.....1381-82
appointment of1375
history1374
investigatory procedure1379-80
limited jurisdiction1378-79
number of cases heard1381-82
powers of1380
scope of authority1375-79
secrecy1380

United Nations:
Universal Declaration of Human Rights1481, 1513-14

United States:
agency152, 291, 301
Bill of Rights, limiting legislative power1491
"blue ribbon" grand jury772
Congress:
Congressional committees, compared with Canadian cabinets1581
and the Supreme Court1585-87
Constitution1483
amendment process1543-45
entrenched Bill of Rights ...1543-44
First Amendment1539, 1543
Fourth Amendment
.....407, 415n, 417, 1582, 1585
Fifth Amendment
.....153, 597, 963, 1611-25
as interpreted by Supreme Court 1586-87
Fourteenth Amendment
.....153, 963, 1582
Eighteenth Amendment1532
corporate bodies equated with individuals1523-25

United States:—con.

discretionary power286
The President's Commission on Law
Enforcement and Administration
of Justice599-601

Venue:

change of765-66, 923
recommendations769
rules re922-24

Wade, H. W. R.:991-92

on administrative courts1413-14
on administrative law187-88
on the right to a hearing1003-4

Warrants:

arrest738-40
search413-18

Weekly Court:668-69

Welfare: *see Family Benefits Act*

Witnesses:

expert1059-60, 1079-80
fees or compensation
.....405-6, 861-63, 887, 899-900

Vol. 1, pp. 1-498: Vol. 2, pp. 499-956: Vol. 3, pp. 957-1332: Vol. 4, pp. 1333-1733

Witnesses:—con.

power to require witnesses to testify
.....427-46
compelling testimony of432-38
legislation conferring powers of
Commissioner under the Public
Inquiries Act432-35
legislation conferring the powers
of a court in civil cases ..435-36
power to commit for contempt
.....441-46
for contempt not committed in
the face of a tribunal437
privilege438-41
procedural rights in investigations
.....447-52
recommendations
.....430-31, 438, 440-41, 446

Workmen's Compensation Board:

.....124-25

Writ of Assistance:417

Writ of Fieri Facias:640

